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**THE ROLE OF SECTION 2(1) AND (4) OF THE EUROPEAN
COMMUNITIES ACT AND SECTION 3(1) OF THE HUMAN RIGHTS ACT
IN THE INTERPRETATION AND APPLICATION OF PRIMARY
LEGISLATION: IMPACT ON JUDICIAL ATTITUDES TO THE
TRADITIONAL CONCEPT OF PARLIAMENTARY SOVEREIGNTY**

BY

ANTHONY EZONFADE OKORODAS

**A THESIS SUBMITTED TO THE UNIVERSITY OF NORTHUMBRIA AT
NEWCASTLE IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR
THE AWARD OF THE DEGREE OF DOCTOR OF PHILOSOPHY**

**RESEARCH UNDERTAKEN IN THE SCHOOL OF LAW, UNIVERSITY OF
NORTHUMBRIA AT NEWCASTLE**

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ABSTRACT

The main aim of this thesis is to examine, through an analysis of relevant case law, the way in which the courts interpret and apply primary legislation pursuant to the interpretative obligation contained in section 2(1) and (4) of the European Communities Act 1972 and section 3(1) of the Human Rights Act 1998, and to assess current judicial attitudes to the traditional concept of parliamentary sovereignty in the light of the judicial perception of the interpretative obligation in the above-mentioned provisions.

As an essential prelude to the examination of the case law on the judicial treatment of the interpretative obligation in the 1972 and 1998 Acts, chapter 2 of the thesis discusses the traditional, *Diceyan* concept of parliamentary sovereignty. This is considered without the effects of the 1972 and 1998 Acts. This chapter demonstrates that the courts perceived it as their constitutional duty to obey and apply the latest will of Parliament without question. It is observed that no legal grounds could exist for challenging the validity or enforceability of primary legislation.

Chapter 3 discusses conventional methods of statutory interpretation. It is observed that conventionally, the principal aim of statutory interpretation is the ascertainment of parliamentary intention in the statute under consideration. Where the intention of Parliament is clear and unambiguous and is not absurd in any way, the courts feel duty-bound to carry out the identified parliamentary intention in line with the rule, demanded by the doctrine of parliamentary sovereignty, that courts obey without question the latest will of Parliament.

The rest of the thesis is devoted to an examination of the way in which the courts use their interpretative powers under section 2(1) and (4) of the 1972 Act and section 3(1) of the 1998 Act when interpreting and applying primary legislation coming within the purview of these enactments.

It is argued that while the courts appear to continue to acknowledge the sovereignty or supremacy of Parliament, the case law reveals that in appropriate cases, section 2(1) and (4) of the 1972 Act and section 3(1) of the 1998 Act has enabled judges to interpret and apply primary legislation in a way that substantially challenges the traditional, *Diceyan* concept of parliamentary sovereignty. They feel able to ignore or otherwise modify the legal effects of unambiguous primary legislation in appropriate cases.

DEDICATION

This study is lovingly dedicated to the evergreen memory of the best friend I ever had and would probably ever have, Barrister Seikemefa Ebipulou (previously Seikemefa Seipulou). He knew I was going to undertake this programme. We talked about it and looked forward to it together. Sadly, he was taken away from me before I started.

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The Study Fellowship mentioned above was part of a Staff Development Programme initiated by the pioneer Vice Chancellor of Niger Delta University (my employers), Professor John Cecil Buseri. So far, the programme has succeeded in enormously enhancing the human resource capacity of the University. I wish to thank him for his foresight and in particular, for his kind approval of my nomination for the Award.

I also wish to thank Professor J. Finine Fekumo, former Dean of the Faculty of Law, Niger Delta University, for graciously nominating me for the Award.

I would like to express my appreciation to my learned senior and former Attorney General of Bayelsa State of Nigeria, the Honourable Talford Ongolo, for his invaluable support. My heartfelt thanks also go to Senator Paulker Emmanuel for his constant encouragement.

No words can sufficiently express my gratitude to my Principal Supervisor, Greer Hogan, for all she did in support of my research. But for her selfless and relentless supervision and encouragement throughout the programme, this thesis could not have seen the light of day. I am also immensely grateful to my Second Supervisor, Alan Davenport, for his invaluable academic support, incisive criticism of drafts and

suggestions for improvement. Needless to mention, I am solely responsible for any errors that might be detected in the thesis.

My adorable family have endured my long absence during the programme. I thank every one of them. I hope I can make up for lost time.

AUTHOR'S DECLARATION

I, ANTHONY EZONFADE OKORODAS, do hereby declare that no part of this thesis has been submitted for any other award. I further declare that this thesis was solely produced by me and the research was not carried out in collaboration with any other person or body of persons.

.....
SIGNATURE AND DATE

TERMINOLOGY ADOPTED IN THE THESIS

The statutes primarily dealt with in this thesis are the European Communities Act 1972 and the Human Rights Act 1998. To avoid clumsy repetitions, throughout the thesis, these statutes have simply been referred to as the 1972 Act and the 1998 Act respectively.

The term, “Community law” flexibly refers to the body of rules and regulations, including treaty provisions, emanating from the Communities referred to in section 1(1) of the 1972 Act, namely, the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community. However, this study has been concentrated on the law emanating from the European Economic Community (EEC), the predominant Community amongst the three. Thus, except the context indicates otherwise, “the Community” refers to the European Economic Community, and “Community law”, “Community legislation” and “Community right” are to be read accordingly. “EEC Treaty” has been used interchangeably with “Rome Treaty” as both refer to the Treaty establishing the EEC signed at Rome on the 25th of March 1957.

Except otherwise indicated in the thesis, “the Convention” refers to the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe on 04 November 1950, and incorporated into United Kingdom domestic law by the 1998 Act. “The Convention rights” refer to the rights guaranteed by the Convention.

“European Court” as used in chapter 4 or in relation to Community law issues in the thesis refers to the European Court of Justice. However, the same when used in chapters 5 and 6 or in relation to Convention right issues in the thesis refers to the European Court of Human Rights.

TABLE OF CONTENTS

Title of Thesis.....	i
Abstract.....	ii
Dedication.....	iii
Acknowledgement.....	iv
Author's Declaration.....	vi
Terminology Adopted in the Thesis.....	vii
Table of Contents.....	ix
CHAPTER 1 – INTRODUCTION.....	1
I. Background to the Research.....	1
II. Aims of the Research.....	10
III. Scope of the Research.....	12
IV. Research Methodology.....	13
A. Selection of Cases.....	13
B. Approach to Case Analysis.....	16
C. Journal Articles.....	17
D. Research Facilities Utilised.....	17
V. Structure of the Thesis.....	18
 CHAPTER 2 - OVERVIEW OF THE TRADITIONAL CONCEPT OF PARLIAMENTARY SOVEREIGNTY	 21
I. Introduction.....	21
II. Judicial Attitudes to the Traditional Concept.....	21
III. Conclusion.....	70

**CHAPTER 3 - CONVENTIONAL JUDICIAL APPROACHES TO
STATUTORY INTERPRETATION.....72**

I. Introduction.....	72
II. The Main Purpose of Statutory Interpretation.....	73
III. Judicial Approaches to Ascertaining the Intention of Parliament.....	75
IV. Conclusion.....	96

**CHAPTER 4 - STATUTORY INTERPRETATION UNDER SECTION 2(1)
AND (4) OF THE EUROPEAN COMMUNITIES ACT.....98**

I. Introduction.....	98
II. Legal and Constitutional Background to the Enactment of Section 2(1) and (4)....	99
III. Judicial Approaches to Statutory Interpretation under Section 2(1) and (4).....	116
VI. Conclusion.....	177

CHAPTER 5 – THE HUMAN RIGHTS ACT: GENERAL.....179

I. Introduction.....	179
II. General Scheme and Essential Provisions of the Act.....	179
III. Conclusion.....	235

**CHAPTER 6 – STATUTORY INTERPRETATION UNDER SECTION 3(1)
HUMAN RIGHTS ACT.....236**

I. Introduction.....	236
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II. Judicial Approaches to Interpretation Pursuant to Section 3(1).....	237
III. Conclusion.....	317
 CHAPTER 7 – CONCLUSION	 324
I. Overview of the Study.....	324
II. Concluding Remarks.....	330
 Table of Cases.....	 341
Table of Statutes.....	349
References.....	353
Selected Bibliography.....	359
Appendix 1 - Selected Provisions of the 1972 Act [Part I]	371
Appendix 2 – Rights Brought Home – Govt’s White Paper (selected portions).....	377
Appendix 3 – The Human Rights Act 1998 (without the schedules).....	391
Appendix 4 – Section 41 of the Youth Justice and Criminal Evidence Act 1999, and its Legislative History.....	413
Appendix 5 – Paragraph 2(1) and (2) of Schedule 1 of the Rent Act 1977, and their Legislative History	425

CHAPTER 1

INTRODUCTION

I. Background to the Research

The doctrine of parliamentary sovereignty, according to Dicey, is the “dominant characteristic” of the English Constitution.¹ It is the bedrock of the unwritten Constitution of the country. It defines the relationship between Parliament and the courts.

The traditional account of the doctrine is to be found in Dicey’s classic work. He says:

“The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament... has, under the English constitution, **the right to make or unmake any law whatever**; and, further, that **no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.**”²

As far as the relationship between Parliament and the courts is concerned, the sum-total of the doctrine is that British courts are bound to obey and apply the will of Parliament as expressed in its latest Act, and that no legal grounds could exist for challenging the validity or enforceability of an Act of Parliament. The doctrine requires absolute judicial obedience to primary legislation.

As a corollary to the doctrine, whenever a court finds that there is a conflict between two Acts of Parliament on the same subject matter, the court must obey the later Act in preference

¹ Dicey, A. V. (1959). Introduction to the Study of the Law of the Constitution. London, The MacMillan Press Limited, at p. 39.

² Ibid, at p. 39-40. The doctrine appears to have been originally stated in Sir Edward Coke’s *Fourth Institute*, re-stated in Blackstone’s *Commentaries* and popularised by Dicey. See Chapter 2 below for an overview of the traditional concept of the doctrine.

to the earlier Act. It does so by way of application of the principle of implied repeal. This principle means that in such a case, the earlier Act of Parliament must be taken as impliedly repealed by the later Act to the extent of the inconsistency between them. In this way, the requirement of the doctrine of parliamentary sovereignty, that the court must obey the will of Parliament expressed in the latest Act on any given subject, is fulfilled.³

Dicey's account of the concept of parliamentary sovereignty has received criticisms⁴ from both judges⁵ and academic commentators. To his critics, the idea that Parliament is absolutely sovereign, and that there could be no legal restraints whatsoever upon its legislative power, could not be correct.

For example, Lord Woolf⁶ has contended that ultimately, the rule of law could validly limit the so-called absolute power of Parliament to legislate as it pleases. According to his Lordship:

“Our parliamentary democracy is based on the rule of law. One of the twin principles upon which the rule of law depends is the supremacy of Parliament in its legislative capacity. The other is that the courts are the final arbiters as to the interpretation and application of the law. As both Parliament and the courts derive their authority from the rule of law so both are subject to it and can not act in manner which involves its repudiation. The respective roles do not give rise to conflict because the courts and Parliament each respects the role of the other. For example, Parliament is meticulous in upholding the *sub judice* rule so as to avoid interfering with the role of the courts. Equally, the courts also respect the privileges of Parliament and will not become involved with the internal workings of Parliament. In addition the courts will seek to give effect wherever possible to both primary and subordinate legislation. The courts will for example where there is a conflict between Community and domestic

³ See the judgments of Scrutton and Maugham, LLJ, in *Ellen Street Estates Ltd v Minister of Health* [1934] All ER 385, [1934] 1 KB 590

⁴ While it is considered important to outline the major criticisms, a full analysis of the criticisms is not intended here as it is beyond the scope of the thesis.

⁵ Mainly in their extra-judicial capacities.

⁶ Writing extra-judicially in 1995. See Woolf (1995). "Droit Public - English Style." Public Law: 57-71.

legislation uphold the domestic legislation as far as possible. The courts will also readily accept legislation which controls how it exercises its jurisdiction or which confers or modifies its existing statutory jurisdiction. I however, see a distinction between such legislative action and that which seeks to undermine in a fundamental way the rule of law on which our unwritten constitution depends by removing or substantially impairing the entire reviewing role of the High Court on judicial review, a role which in its origin is as ancient as the common law, predates our present form of parliamentary democracy and the Bill of Rights.”⁷

His Lordship went on to say that

“... if Parliament did the unthinkable,⁸ then I would say that the courts would also be required to act in a manner which would be without precedent. Some judges might chose to do so by saying that it was an un rebuttable presumption that Parliament could never intend such a result. I myself would consider there were advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the courts’ inalienable responsibility to identify and uphold.”⁹

All that can be said of Lord Woolf’s criticism of the *Diceyan* view of parliamentary sovereignty is that it is based on an unrealistic scenario¹⁰ and is thus unhelpful. It would seem that the criticism has more to do with political constraints on the power of Parliament to legislate as it pleases and less to do with legal limitations to Parliament’s legislative authority.¹¹ In any case, his Lordship himself indicated that in refusing to obey an Act of Parliament on grounds of the rule of law, the courts would be acting without precedent.

In a similar vein, Sir Stephen Sedley has also written of

“a new and still emerging constitutional paradigm, no longer of Dicey’s supreme Parliament to whose will the rule of law must finally bend, but of a bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which

⁷ Ibid, at p. 68

⁸ That is, fundamentally undermine the rule of law. See quotation above, note 8.

⁹ Op. cit., supra, note 7, at p. 69.

¹⁰ That is, “the unthinkable.”

¹¹ Dicey himself conceded that there were “actual limitations” to Parliament’s legislative power. These he classified as external and internal limits, both of which were essentially political in nature, and not legal. See op. cit., supra, note 1, at pp. 76 – 85.

the Crown's ministers are answerable – politically to Parliament, legally to the courts”¹²

Further, writing on the need for a guaranteed set of fundamental rights, Sir John Laws criticised what was apparently Dicey's view of parliamentary sovereignty as “out-dated.”¹³ He advocated for “a higher-order law: a law which cannot be abrogated by a government with the necessary majority in Parliament.”¹⁴ It would seem that for Sir John, this “higher-order law” would be one beyond the reach of Parliament and within the protective cover of the courts.

In the twentieth century, a growing number of academic commentators have also challenged Dicey's view that Parliament's power to legislate as it please could not be subject to any legal control, and have put forth an alternative view. Essentially, these commentators contend that while Parliament could enact whatever legislation it wishes to enact, it must do so in accordance with the manner and form prescribed by existing law.¹⁵

Sir Ivor Jennings appeared to have laid the groundwork for the *manner and form* argument. He likened the United Kingdom Parliament to a prince and stated:

“If a prince has supreme power, and continues to have supreme power, he can do anything, even to the extent of undoing the things which he had previously done. If he grants a constitution, binding himself not to make laws except with the consent of an elected legislature, he has power immediately afterwards to abolish the legislature without its consent and to continue legislating by his personal decree.

¹² Sedley, S. (1995). "Human Rights: a Twenty-First Century Agenda." Public Law: 386 - 400

¹³ Laws, J. Ibid. "Law and Democracy." 72-93.

¹⁴ Ibid, at p. 84

¹⁵ This is the so-called “manner and form” argument.

“But if the prince has not supreme power, but the rule is that the courts accept as law that which is made in the proper legal form, the result is different. For when the prince enacts that henceforth no rule shall be law unless it is enacted by him with the consent of the legislature, the law has been altered, and the courts will not admit as law any rule which is not made in that form. Consequently a rule subsequently made by the prince alone abolishing the legislature is not law, for the legislature has not consented to it, and the rule has not been enacted according to the manner and form required by the law for the time being.”¹⁶

Clearly, two notions of parliamentary sovereignty are discernable from the above statement.

The first is that Parliament enjoys absolute supremacy and that its legislative power could not be fettered in any manner and form by any law whatsoever. By this notion, the courts are duty bound to obey and apply the latest Act of Parliament irrespective of any default in the law-making procedure prescribed by existing legislation. Thus, any attempt by Parliament to fetter the law-making powers of its successor Parliaments would be futile. This is Dicey’s notion of parliamentary sovereignty.

The second notion is that the courts would obey an Act of Parliament only if it was enacted in accordance with the procedure prescribed by existing legislation. Thus, Parliament could bind itself and its successor Parliaments as to the manner and form future Acts of Parliament must be enacted, and the courts would enforce this. Sir Ivor’s inclination seemed to be towards this second notion. Nevertheless, he declared that the legal position was unclear because of lack of judicial authorities clearly establishing the correctness of either notion.¹⁷

H.L.A. Hart wrote in a similar vein. He said:

¹⁶ Jennings (1959). The Law and the Constitution.

¹⁷ Clearly, Sir Ivor did not regard *Vauxhall Estates Ltd. V Liverpool Corporation* [1932] 1 K.B. 733 and *Ellen Street Estates Ltd v Minister of Health* [1934] 1 K.B. 590 as judicial authority for the proposition that Parliament could not bind itself or its successors as to the manner and form of subsequent legislation. These cases are discussed in chapter 2. But Professor H.W.R. Wade apparently contends that these two decisions constituted authorities for the proposition “that the law-making process was not at the mercy of Parliament for the time being, but was guarded by the courts in order that future Parliaments might be unfettered.” See Wade, H. W. R. (1955). “The Basis of Legal Sovereignty.” Cambridge Law Journal: 177-197.

“[O]lder constitutional theorists¹⁸ wrote as if it was a logical necessity that there should be a legislature which was sovereign, in the sense that it is free, at every moment of its existence as a continuing body, not only from legal limitations imposed *ab extra*, but also from its own prior legislation... [A]nother principle ... might equally well, perhaps better, deserve the name of ‘sovereignty’. This is the principle that Parliament should *not* be incapable of limiting irrevocably the legislative competence of its successors but, on the contrary, should have this wider self-limiting power. Parliament would at least once in its history be capable of exercising an even larger sphere of legislative competence than the accepted established doctrine allows to it.”¹⁹

It is apparent that even though Hart believes that parliamentary sovereignty is open to the alternative view stated by him, the “presently accepted”²⁰ view is that popularised by Dicey.

Professor R.F.V. Heuston²¹ has been more emphatic in propagating the *manner and form* argument, stating that while the courts could not question the area of power (or the subject-matter of legislation) of Parliament, they have jurisdiction to determine the validity of legislation on grounds either that Parliament was not properly composed as required by existing law, or that the procedure prescribed by law was not followed.

On the other hand, Professor Wade²² has argued that the rule that future Parliaments could not be bound as to the manner and form of legislation, or that the courts would obey every Act of Parliament is a rule of the common law;²³ however, unlike other common law rules, this rule could not be altered by Parliament. His argument is that the rule is the source of Parliament’s legislative authority, and not the other way round. Therefore, no statute could alter or abolish the rule. He says:

¹⁸ Probably referring to Coke, Blackstone and Dicey, *op. cit.*, *supra*, notes 1 and 2

¹⁹ Hart, H. L. A. (1994). The Concept of Law. Oxford, Oxford University Press, quoted at p. 436, McLean, I. and A. McMillan (2007). "Professor Dicey's Contradictions." Public Law(Autumn): 435 - 443.

²⁰ Per Hart, *op. cit.*, *supra*, note 20.

²¹ Heuston, R. F. V. (1964). Essays in Constitutional Law. London, Stevens & Sons.

²² Wade, H. W. R. (1955). "The Basis of Legal Sovereignty." Cambridge Law Journal: 177-197.

²³ Sir Ivor Jennings seemed to have been of the same view, stating that the matter of the sovereignty of Parliament “is a matter of common law.” *Op. cit.*, *supra*, note 17, at pp. 145-146.

“The rule is above and beyond the reach of statute... because it is the source of the authority of statute. This puts it into a class by itself among rules of common law, and the apparent paradox that it is unalterable by Parliament turns out to be a truism. The rule of judicial obedience is in one sense a rule of common law, but in another sense – which applies to no other rule of common – it is the ultimate *political* fact upon which the whole system of legislation hangs. Legislation owes its authority to the rule; the rule does not owe its authority to legislation. To say that Parliament can change the rule, merely because it can change any other rule, is to put the cart before the horse.”²⁴

Wade argued further that the rule, “being simply a political fact” could only be changed by revolution, by which the courts, in whose protection the rule ultimately lies, decide who they obey in the new political reality. This the courts would do without a purely legal justification.²⁵

In addition to the above criticisms, there have also been claims by some commentators that in later writing, Dicey repudiated his views on the traditional concept of parliamentary sovereignty. For example, Ian McLean and Alistair MacMillan, referring to Dicey’s writings on the question of Irish Home Rule, stated:

“Under continuing omnipotence, the Act of Union 1800 had no entrenched status. Therefore Parliament had the unfettered power to pass a Government of Ireland Act, as it finally did in 1914. Dicey very badly wanted Parliament not to pass a Government of Ireland Act, so he repudiated continuing omnipotence.”²⁶

Despite all these criticisms of the traditional concept, it is observed that by and large, there have been profound judicial acknowledgement and acceptance of the traditional concept of

²⁴ op. cit., supra, note 23, at pp. 187-188

²⁵ Ibid, see p. 189

²⁶ McLean, I. and A. MacMillan (2007). "Professor Dicey's Contradictions." *Public Law*(Autumn): 435 - 443, at p. 437.

However, Bogdanor has argued that in the Law of the Constitution, (see op. cit., supra, note 1) Dicey only wrote about Parliament being supreme in a legal sense, and that he never abandoned this view at any time. Bogdanor further contended that Dicey’s writings on the Irish Home Rule were not works of law, but of politics. See Bogdanor, V. (2008). "The Consistency of Dicey: a reply to McLean and MacMillan." *Public Law*(Spring): 19 - 20.

parliamentary sovereignty.²⁷ The case law discussed in chapter two below demonstrates that the judges have often been resolute in adhering to the demands of the doctrine.

While Parliament has the undoubted power to enact legislation, it is the duty of the courts to interpret and apply what Parliament has enacted. As will be shown in chapter three of this thesis, the principal judicial aim of statutory interpretation is to ascertain the intention of Parliament as expressed in an enactment so that the enactment can be applied in accordance with the expressed parliamentary intention. This approach to interpretation serves to fulfil the demands of the traditional concept of parliamentary sovereignty.

However, relatively recent constitutional developments seem to have brought about changes to the way in which the courts approach their interpretative duties in relation to certain classes of primary legislation. The first constitutional development relevant to this thesis is the enactment of the European Communities Act of 1972. Section 2(1) and (4) of the Act imposes an obligation on the courts to construe all legislation in a manner that accords priority to directly effective Community law over any inconsistent provision of national law.

The second development is the enactment of the Human Rights Act of 1998, which gives effect to the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms.²⁸ Section 3(1) of the Act imposes an obligation on the courts to construe and give effect to all legislation in a manner that complies with the Convention rights, “so far as it is possible to do so.”

It is observed that each of the above statutory provisions imposes interpretative obligations on the courts, requiring them to construe primary legislation in a manner significantly

²⁷ The case law on this point is discussed in Chapter 2 of the thesis.

²⁸ Agreed by the Council of Europe at Rome on the 4th day of November 1950.

different from the conventional methods of statutory interpretation. They each introduce a new and powerful statutory rule of interpretation of primary legislation with the potential of affecting the traditional concept of parliamentary sovereignty one way or another.

Recent judicial dicta emanating from some members of the House of Lords have raised questions about the possible impact of the interpretative obligation under the provisions mentioned above on the traditional concept of parliamentary sovereignty. In *Jackson v Her Majesty's Attorney General*,²⁹ a number of their Lordships questioned the continued relevance of the traditional concept in light of the 1972 Act and 1998 Act. According to Lord Steyn, "The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom."³⁰ Lord Hope seemed to express agreement with Lord Steyn's statement above when he stated that "the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified."³¹

These pronouncements appear to suggest that judicial attitudes to the traditional concept of parliamentary sovereignty has changed, or is changing, as a consequence of the interpretative obligation imposed on the courts by section 2(1) and (4) of the 1972 Act and section 3(1) of the 1998 Act. The dicta tend to suggest that the rule of absolute judicial obedience to an Act of Parliament no longer applies.

As will be seen in chapter two, the case law, at least from the 20th century, has amply indicated an overwhelming judicial adherence to the *Diceyan* concept of parliamentary

²⁹ [2005] UKHL 56

³⁰ Ibid. See paragraph 102 of the judgment.

³¹ Ibid. See paragraph 104 of the judgment.

sovereignty. Thus conventional judicial approach to statutory interpretation has generally been guided by the need to adhere to the demands of parliamentary sovereignty.

Against this background, it has been necessary in this study to examine the interpretative approaches adopted by the courts pursuant to the interpretative obligations contained in the 1972 Act and the 1998 Act, to examine how the new approaches differ from conventional ways³² of statutory interpretation, and to attempt an assessment of current judicial attitudes to the traditional concept of parliamentary sovereignty in the light of their interpretative powers under the above-mentioned statutes. Are the courts, pursuant to their interpretative obligations above mentioned, shifting from a position of absolute judicial obedience to primary legislation as demanded by the traditional concept of parliamentary sovereignty, to a position that appears to challenge the concept? It is intended that these issues will be investigated in the thesis.

II. Aims of the Research

The principal aim of this thesis is to examine how the courts have approached their interpretative obligation under section 2(1) and (4) of the 1972 Act and section 3(1) of the 1998 Act in the interpretation and application of primary legislation. This aim is intended to be achieved through an analysis of relevant case law.

As has been noted above, the thesis also seeks to assess current judicial attitudes to the traditional concept of parliamentary sovereignty in the light of their approach to statutory interpretation under the statutes mentioned above.

³² See chapter 3 below.

The thesis also seeks to demonstrate that judicial attitudes to the traditional concept of parliamentary sovereignty (absent the effects of the 1972 Act and the 1998 Act) have tended to be one of almost unreserved acceptance. The thesis will further discuss conventional approaches to statutory interpretation and will seek to demonstrate that judicial loyalty to the traditional concept of parliamentary sovereignty is usually at the heart of the interpretative process.

It is hoped that at the end of the study, after an analysis of the relevant case law and a synthesis of relevant academic literature, conclusions could be drawn as to:

- (1) whether the interpretative approaches adopted by the courts pursuant to the interpretative obligation under the 1972 Act and the 1998 Act are indeed significantly different from the conventional ways of statutory interpretation;
- (2) whether, and to what extent, the interpretative approaches under the relevant statutes mentioned above impact on judicial attitudes to parliamentary sovereignty?

III. Scope of the Research

The scope of the research has been guided by the aims set out above. Every effort has been made to keep the research focused on the aims and the ultimate objective of the research, which is to examine the way the courts have utilised their interpretative powers under the 1972 and 1998 Acts, and to evaluate current judicial attitudes to the traditional concept of parliamentary sovereignty in light of the mentioned interpretative powers.

To begin with, the study discusses the traditional concept of parliamentary sovereignty. The discussion here has been limited mainly to outlining what the traditional concept means, and examining judicial attitudes to the concept, absencing the effects of the 1972 and 1998 Acts respectively. The discussion of the traditional concept has enabled a better evaluation to be made of current judicial attitudes in light of the courts' interpretative obligation under the 1972 and 1998 Acts respectively.

Since one of the aims of the research has been to examine how the interpretative obligation under the 1972 and 1998 Acts differs from conventional methods of statutory interpretation, it has been necessary to discuss some of those relevant methods. The principal focus here has been twofold: (1) to draw attention to the fact that the principal judicial aim of statutory interpretation is the ascertainment of parliamentary intention expressed in the statute under consideration, and (2) to highlight common law powers of the court to depart from what appears to be the natural and ordinary meaning of statutory words, to examine the limits of those powers, and to compare this with what obtains under the 1972 and 1998 Acts.

The rest of the research is devoted to an examination of how the courts have approached the interpretative obligation contained in section 2(1) and (4) of the 1972 Act and section 3(1) of

the 1998 Act. The focus here has been mainly to examine judicial reaction to primary legislation in the light of the relevant provisions of the two statutes mentioned above.

IV. Research Methodology

A. Selection of Cases

This research has been based mainly on an analysis of relevant case law. The huge body of cases ranging across the entire spectrum of the research meant that care had to be taken to select leading cases in each subject area. The hope has been that this would enable a more compact and manageable study of the specific research questions.

The cases come in four major groups. The first group had to do with the traditional concept of parliamentary sovereignty. The principal guidance has been to select cases that illustrate judicial acknowledgement and acceptance of the principal feature of the traditional concept, which is the rule of unqualified judicial obedience to primary legislation. These cases are mainly to be found in chapter 2 of the study. The context in which this group of cases was decided has to be noted. They had no connection to the 1972 and 1998 Acts. The aim here has been to use these cases as a helpful background material in assessing current judicial attitudes to the traditional concept of parliamentary sovereignty in the light of the interpretative obligations contained in the mentioned statutes.

The next group of cases is that highlighting conventional methods of statutory interpretation. The focal point pursued here is that judicial interpretation is usually guided by the need to ascertain and carry out the intention of Parliament as expressed in the statute under

consideration, in fulfillment of the traditional concept of parliamentary sovereignty. Of particular interest in this group of cases are those illustrating the power (and the limits of the power) of the court to depart from what appears to be the plain meaning of statutory provisions. It will be shown that the judicial aim in such cases is not to challenge the will of Parliament in enacting the statute under consideration, but to discover or clarify parliamentary intention so that it can be applied accordingly. On the whole, this group of cases will enable proper assessments to be made of how the interpretative principles adopted pursuant to the interpretative obligations under the 1972 and 1998 Acts differ from the principles enunciated in this group of cases.

The third group deals with the interpretative obligation under section 2(1) and (4) of the 1972 Act. This is one of the core aspects of the research. There are hundreds of cases dealing with Community law and its effect on United Kingdom domestic law. This is particularly so in the area of employment law and competition law. Therefore, even more care had to be taken in the selection of cases. The principal focus has been on cases where the courts have applied or considered the interpretative obligation under section 2(4) of the Act in the interpretation and application of primary legislation. The aim here is to examine judicial reaction to primary legislation thought to breach applicable Community law, and to attempt to locate the principle upon which the resulting decisions are based.

The fourth and last of the major groups of cases deals with the interpretative obligation under section 3(1) of the 1998 Act. Here again, the cases are numerous. Effort has been made to select only those cases where the courts have either used or considered the use of section 3(1) interpretation in construing and applying primary legislation. This of course includes both cases where they have applied section 3(1) interpretation as well as cases where they have

refrained from applying it. The key guidance is that the section 3(1) point must be an issue, either raised by the parties themselves, or by the court *suo moto*. Therefore, cases where the courts have made declarations of incompatibility without section 3(1) being in issue have generally been left out of the study.³³ The reason for this is that the research focuses on how the courts have approached the interpretative obligation in section 3(1), and whether their approach has had any impact on judicial attitudes to the traditional concept of parliamentary sovereignty.

In general, effort has been made to select only the leading cases on the topics researched, especially as regards the interpretative obligations under the 1972 and 1998 Acts. Most of them are decisions of the House of Lords. Preference has been given to these decisions, wherever possible. The reason is that being the highest court of appeal, its decisions are the most authoritative and they constitute precedent to be followed in subsequent cases. A case that applies or adopts principles already enunciated in a leading case is in general not extensively discussed unless it introduces a new dimension, or contains notable judicial pronouncements.

In addition to the major groups of cases indicated above, it has been necessary to discuss some leading European cases. Of particular relevance are the leading cases establishing the twin European principles of direct applicability and supremacy of Community law. This has been necessary to throw light on the background to the enactment of section 2(1) and (4) of the 1972 Act.

B. Approach to Case Analysis

³³ An example of such cases can be found in the co-joined appeals: *A and others v Secretary of State for the Home Department*; *X and another v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169

The selected cases have been examined taking into consideration the peculiar facts and circumstances of each case, including social and political backgrounds and such other extra-legal factors that may have influenced the outcome of the decision.

The statutory context in each case is particularly examined. This is of vital importance in the study. The legislative history of relevant statutory provisions are explored to determine parliamentary intention, and to assess whether that intention has in any way been departed from as a consequence of the application of the interpretative obligation under the 1972 and 1998 Acts.

It was found that judicial approaches to the interpretative obligation under the Acts have not been completely uniform. As a result, a comparative approach has been adopted in part in the analysis of the various judicial approaches to the interpretative obligation.

On the whole, the case law is the centre around which the thesis revolves and from which the general conclusions are drawn.

C. Journal Articles

Use has been made of journal articles dealing with various aspects of the research. However, care has been taken to restrict treatment of relevant articles mainly to a brief statement or

analysis of the argument or viewpoint of the authors on a controversial issue, or to compare or contrast various viewpoints articulated by authors on a given topic. It has been necessary sometimes, either to criticise or to support the viewpoints expressed in various journal articles.

D. Research Facilities Utilised

The research was mostly internet-based and almost entirely conducted by use of Northumbria University's electronic resources. Through NORA, the University's gateway to an array of electronic resources, it was possible to find virtually all of the selected cases examined in the research, and also many of the journal articles. The legal databases of Lexis-Nexis Professional and Westlaw proved to be particularly invaluable.

Apart from Northumbria University's electronic resources, use was also made of the Parliamentary web site at www.parliament.uk/ from which detailed official reports of relevant debates in the House of Lords and House of Commons as well as some of the most recent reports of House of Lords decisions were obtained. The web site of the Office of Public Sector Information (www.opsi.gov.uk) was also helpful, particularly in obtaining full texts of statutes. Research material was also obtained from the web site of the National Archives at www.nationalarchives.gov.uk.

Relevant books, journal articles, law reports and official reports of Parliamentary proceedings which were not available online were found in the University library. The library's Inter-Library Loan Service was very helpful in securing material that was not available in the library.

V. Structure of the Thesis

Since the ultimate aim of the research is to assess the impact of the interpretative obligations contained in section 2(1) and (4) of the 1972 Act and section 3(1) of the 1998 Act on the traditional concept of parliamentary sovereignty, it was both necessary and expedient that the main body of the thesis began with an overview of the traditional doctrine without reference to the potential effects of the interpretative obligations contained in the Acts. This has been done in chapter 2 of the thesis. Chapter 2 explains what the traditional concept of the doctrine entails. Further, the chapter reviews the case law and examines judicial attitudes to the traditional concept.

The traditional concept of parliamentary sovereignty requires the courts to obey and apply without question the intention of Parliament as manifest in primary legislation. However, the intention of Parliament can only be determined by the courts by means of application of principles and rules of statutory interpretation. These are common law principles. As a general rule, the courts accept that clear and unambiguous words used in a statutory provision are to be given their natural and ordinary meaning as this best indicates the intention of Parliament. However, there are instances where the courts feel able to change what appears to be the ordinary meaning and effect of plain words used in statutory provisions with the result of seeming to depart from the intention of Parliament. Chapter 3 mainly discusses relevant principles that enable the courts to do so. The limits of the power of the courts to depart from the meaning of plain words have been of particular interest. It will be shown that the power is used, not as a means of challenging parliamentary intention, but as a means of effectively determining parliamentary intention, thus enabling the court to apply Parliament's intention

in accordance with the demands of the traditional concept of parliamentary sovereignty. Chapter 3 enables comparison to be made of this common law power with the interpretative powers under section 2(4) of the 1972 Act and section 3(1) of the 1998 Act, which seem to enable courts to depart from the enacted intention of Parliament.

Chapter 4 examines the interpretative obligation under section 2(1) and (4) of the 1972 Act. First, it explores the legal and constitutional background to the enactment of the above-mentioned provisions. This enables an appreciation of the legislative rationale behind the provisions, which in turn enables a better understanding of the effects of the interpretative obligation on the traditional concept of parliamentary sovereignty. Secondly, the chapter examines judicial approaches to section 2(4) interpretation. The main focus is an examination of the judicial reaction to primary legislation found to violate directly effective Community law. This has been done through an analysis of relevant case law. An attempt is made in chapter 4 to locate the possible premise upon which the judicial treatment of the legal and constitutional relationship between United Kingdom primary legislation on the one hand, and directly effective Community law on the other hand, is based.

Chapter 5 discusses the general scheme and essential provisions of the 1998 Act. In particular, the chapter highlights the fact that parliamentary sovereignty is preserved. This chapter is meant to serve as background material to chapter 6, which examines the case law on the interpretative obligation contained in section 3(1) of the 1998 Act.

Chapter 6 examines the interpretative obligation under section 3(1) of the 1998 Act. The chapter identifies two distinctive judicial approaches to statutory interpretation pursuant to the interpretative obligation under section 3(1). The first approach tends toward a very creative or radical use of the interpretative obligation, sometimes posing considerable

questions as to whether the courts are thereby challenging parliamentary sovereignty. The second approach tends towards a high degree of deference to the concept of parliamentary sovereignty, sometimes raising questions as to the effectiveness of the 1998 Act. These two approaches are examined in the chapter. It is found that on balance, judicial use of section 3(1) interpretation appears to be tilting towards a more rights-oriented interpretation and application of statutes such that increasingly, the courts appear not to be bothered with concerns about parliamentary sovereignty.

Chapter 7 of the thesis contains the conclusion. This chapter reviews the evidence distillable from the cases analysed and attempts to draw general conclusions. It will be argued that the interpretative obligations contained in the 1972 and 1998 Acts have given the courts greater powers of interpretation never before available to them under the conventional methods of interpretation. There appears to be evidence that so far as the interpretative obligations contained in the relevant statutes remain unaltered, their increased use may lead, in the future, to a situation where the courts might be completely uninhibited by concerns about parliamentary sovereignty, at least with respect to cases where the interpretative obligations are applicable.

CHAPTER 2

OVERVIEW OF THE TRADITIONAL CONCEPT OF PARLIAMENTARY SOVEREIGNTY

“... an Act of Parliament can do no wrong, though it may do several things that look pretty odd...”³⁴

I. Introduction

This chapter is intended to take an overview of the traditional *Diceyan* concept of parliamentary sovereignty. The primary aim is to examine the case law and discover judicial attitudes to this traditional concept. The chapter will demonstrate that there is an overwhelming judicial inclination towards unreserved respect for the traditional concept of parliamentary sovereignty.

It has to be noted that this chapter examines judicial attitudes to the traditional concept of parliamentary sovereignty without consideration of the effects of the interpretative obligation contained in the 1972 and 1998 Acts. The purpose is to enable comparison to be made of the courts' attitude to the concept before and after the enactment of the Acts mentioned.

II. Judicial Attitudes to the Traditional Concept

As a legal concept, parliamentary sovereignty defines the constitutional relationship between Parliament and the courts. The concept means that Parliament has the legal power to make any law it deems fit, and that whatever it enacts will be obeyed and applied by the courts without question. There can be no legal grounds whatsoever for challenging the validity or enforceability of an Act of Parliament.

According to Dicey,

³⁴ Per Holt, CJ, in *City of London v Wood* [1701] 12 Mod. Rep 669, 687-688

“The principle ... of Parliamentary sovereignty may, looked at from its positive side, be thus described: Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts. The same principle, looked from its negative side, may be thus stated: there is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the courts in contravention of an Act of Parliament.”³⁵

Dicey’s view of the doctrine of parliamentary sovereignty can be dissolved into three basic elements. The first element of the doctrine is that no court of law can disobey or render ineffective the provisions of an Act of Parliament. There can be no legal grounds upon which a court may rely in invalidating an Act. An Act that has been passed by both Houses of Parliament and has received the Royal Assent commands the unquestioned obedience of the courts.

In the past, there have been a number of attempts challenging the validity or enforceability of Acts of Parliament on grounds of procedural irregularity in the Parliamentary process leading up to the enactment of an Act of Parliament. However, the courts have in general, been inclined to the view that the doctrine of parliamentary sovereignty, together with the constitutional principles of the separation of powers and parliamentary privilege, require them to obey and apply all Acts of Parliament irrespective of any such irregularity.

Thus, courts generally obey and apply an Act of Parliament notwithstanding any failure to comply with the standing orders of either Houses of Parliament. In other words, once a Bill has been passed and has received the Royal assent, the law requires absolute judicial obedience of the terms of the Act irrespective of any defect in the process by which it became an Act.

³⁵ Dicey, *op. cit.*, *supra*, note 1, at p. 40.

In *Edinburgh and Dalkeith Railway Co. v Wauchope*³⁶ the Respondent had claimed against the Appellant certain rights under a private Act of Parliament enacted in 1826.³⁷ The Appellant Company opposed the claim, contending amongst others that the right supposedly conferred by the 1826 private Act relied upon by the Respondent had been repealed by a subsequent private Act of Parliament.³⁸ The Respondent countered this contention by arguing that the latter Act of Parliament, being a private Act affecting his vested rights conferred by the previous Act, could not apply to him because it was introduced in Parliament and passed without due Parliamentary notice served on him.

Before the Lord Ordinary, the case was decided on other grounds. However, the Lord Ordinary seemed to agree, *obiter*, with the contention of the Respondent, that the latter Act of Parliament could not be applied to take away the Respondent's vested rights granted by the earlier Act because due notice was not given to him as an interested party.

On appeal, Lord Brougham, Lord Cottenham and Lord Campbell all criticised this view. According to Lord Campbell,

“There is no foundation whatever for it. All that a Court of Justice can do is look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal Assent, no Court of Justice can inquire into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses. I trust, therefore, that no such inquiry will again be entered upon in any Court in Scotland, but that due effect will be given to every Act of Parliament, private as well as public, upon what appears to be the proper construction of its existing provisions.”³⁹

Lord Campbell's pronouncement is significant in two respects. First, it indicated what the courts would recognise as an Act of Parliament and how the courts would react to every Act

³⁶ [1842] VII Clark & Finnelly, 710

³⁷ 7 Geo. 4, c. xcvi.

³⁸ 4 and 5 W. 4, c. lxxi.

³⁹ [1842] VII Clark & Finnelly, 710 at p. 725

properly recognised as such. An Act appearing on the Parliamentary roll, and which, on the face of it, appeared to have been passed by the Commons as well as the Lords, and had received the Royal assent, was automatically given due legal recognition as an Act of the sovereign Parliament. This has been referred to as the “enrolled Act” rule.⁴⁰ Once the court identifies an instrument as an enrolled Act of the sovereign Parliament, no grounds could exist for challenging its enforceability. The court cannot carry out any investigation aimed at determining whether it should or should not apply an Act of Parliament on the ground that irregularities were committed in the process of the passage of the Act.

The second significant thing about Lord Campbell’s statement is that it seemed to indicate that there could be no distinction between private and public Acts of Parliament. The same “enrolled Act” rule applied to both. A public Act of Parliament, just like a private Act, could not be challenged on grounds of defect in legislative procedure. Both of them required absolute judicial obedience.

Willes, J in *Lee and Another v The Bude & Torrington Junction Railway Company, Ex parte Stevens, Ex parte Fisher*,⁴¹ reiterated this view that the court is bound to obey and apply an Act of Parliament notwithstanding any defect in the process by which it was enacted. In the case, Stevens and Fisher, who were judgment debtors, had claimed that certain Acts of Parliament upon which the plaintiffs relied in pursuing the judgment debt against them, contained false recitals fraudulently introduced by the plaintiffs for the purpose of furthering their own interests. They contended in effect that it would be inequitable in the circumstances

⁴⁰ Admittedly, Bills are no longer entered on the “Roll”, but are published in accordance with parliamentary procedure. However, it is submitted that this should not affect the continued relevance of the “enrolled Act” rule.

⁴¹ [Court of Common Pleas] [1871] [L R] 6 C P 576

to enforce the provisions of the Acts and issue execution based on those provisions. Wille, J, had this to say:

“I would observe, as to these Acts of Parliament, that they are the law of this land; and we do not sit here as a court of appeal from Parliament.... We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by Parliament with the consent of the Queen, lords and commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but, so long as it exists as law, the Courts are bound to obey it.”⁴²

Wille’s statement indicates a total absence in the United Kingdom, of judicial power to review legislative action. This seems to be due to the fact that the courts regard an Act of Parliament to be the highest form of law. That being so, there could be no other rule of law by which the courts could determine the validity of an Act. In Wille’s view, a judicial challenge to the validity of an Act of Parliament is inconceivable.

The issue as to whether a court is entitled to disregard a provision in an Act of Parliament on the ground that it was obtained by fraudulent misrepresentation was specifically argued in the House of Lords and determined by their Lordships in the case of *British Railways Board v Pickin*.⁴³

The case concerned the validity of section 18 of the British Railways Act 1968. Section 259 of a private Act of Parliament enacted in 1836 that had set up the Bristol to Exeter railway provided that the land upon which the railway was built would revert to the owners for the time being of the adjacent land in the event that the railway was abandoned. Many years later, the British Railways Board promoted and subsequently secured the enactment of another

⁴² Ibid.

⁴³ [1974] WLR 208

private Act of Parliament, that is, the British Railways Act of 1968. The Act authorised the compulsory acquisition, amongst others, of the railway set up by the 1836 Act. Further, section 18 of the 1968 Act provided in effect that the provisions of section 259 of the 1836 Act (and similar provisions in other Acts) *shall* not apply to any lands vested in the British Railways Board. This meant that even if the railway were to be abandoned, the land upon which it was built would not revert to the owners of the adjacent land, but would continue to be vested in the Board.

The preamble to the 1968 Act had contained a recital to the effect that plans of the lands to be acquired as well as a book of reference to the plans containing the names of the persons to be affected by the acquisition had been deposited with the clerk of the council of the county in which the lands were situated.

The respondent in the appeal, (Mr. Pickin) who had purchased a portion of land adjacent to the railway in dispute, instituted proceedings claiming that the railway had been abandoned and that by virtue of section 259 of the 1836 Act, he was entitled to a portion of the abandoned railway. The appellant opposed the claim and relied in particular on section 18 of the 1968 Act, which nullified the effect of section 259 of the 1836 Act.

The respondent then filed a reply where, by paragraphs 3 and 4, he contended that section 18 of the 1968 Act was ineffective to deprive him of his interest in the abandoned railway on the ground that Parliament was fraudulently misled into passing the Act. He claimed that the recital contained in the Act as to the depositing of the plans of the lands was false, and that the appellant Board, for its own benefit, fraudulently inserted the recital.

The appellant applied to have paragraphs 3 and 4 of the respondent's reply struck out for abuse of the process of the court. The Master accordingly struck them out. On appeal, Chapman, J, affirmed the Master's decision principally on the ground that the court could not go behind the Act and investigate the processes leading up to the passing of the Act.

On further appeal to the Court of Appeal⁴⁴, the appellate judges⁴⁵ decided that the issue whether the 1968 Act was obtained by fraud was a triable issue; accordingly paragraphs 3 and 4, which raised the issue, were ordered to be restored. The reasoning of the Court in declaring the issue of fraud a triable one in the context of the case can be gleaned from the statement of Lord Denning:

“We should let it go trial on the ... issue whether this Act of Parliament was fraudulently obtained. That is a triable issue. It is deserving of investigation by the court. As I have said in the course of the argument, supposed the court were satisfied that this private Act was improperly obtained, it might well be the duty of the court to report that finding to Parliament, so that Parliament itself could take cognisance of it. Parliament could put the matter right, if it thought fit, by passing another Act. In my opinion it is the function of the court to see that the procedure of Parliament itself is not abused and that undue advantage is not taken of it. In so doing the court is not trespassing on the jurisdiction of Parliament itself. It is acting in aid of Parliament, and , I might add, in aid of justice. If it is proved that Parliament was misled, the court can, and should, draw it to the attention of Parliament.”⁴⁶

There was no clear indication that that the Court of Appeal was persuaded by the *manner and form* argument, or even that they were making a statement of principle that a private Act of Parliament obtained improperly was liable to be invalidated or ignored by the court. As a matter of fact, the Court indicated that the case before them has not has not presented the proper occasion to make a final pronouncement on the matter. The decision the Court was

⁴⁴ *Pickin v British Railways Board* [1972] 3 WLR 824

⁴⁵ Lord Denning, M.R., Edmund Davies and John Stephenson, LLJ.

⁴⁶ *Op cit*, supra, note 45, at p. 831, paragraphs E – H.

making was that the facts alleged in support of the allegation of fraud be tried. Seen in this light, one might say that the matter did not involve any conflict with Parliament.

However, it is difficult to envisage how such an allegation could be investigated without investigating the parliamentary process by which the Act in question was enacted. Secondly, assuming the facts alleged were found to be proved, there is the question of what should happen in the interim, pending Parliament's decision to take corrective legislative measures. For example, could the court suspend the operation of the Act pending Parliament's decision?

Further, the decision of the Court of Appeal raised a real possibility that the court could decide the enforceability of section 18 of the 1968 Act one way or the other. If the court were to decide that the section in question was not enforceable against the respondent, it would mean that the court would have to disregard the provisions of the section as far as it affected the interests of the respondent.

The judgment of the Court of Appeal appeared to have been influenced by the fact that the case involved a private Act alleged to have been obtained by fraud. The primary focus appeared to be on the conduct of the party that obtained the Act. The reasoning is that persons must not be allowed to use the Parliamentary process fraudulently and take undue advantage of it. However, as have been stated above, an investigation of such an allegation would necessarily involve investigating the internal processes of Parliament, a judicial act that would certainly breach the principle of parliamentary privilege embodied in Article IX of the Bill of Rights 1689.

On appeal to the House of Lords, their Lordships made it clear that the Court of Appeal was wrong. According to Lord Reid,

“The idea that a court is entitled to disregard a provision in an Act of Parliament **on any ground**⁴⁷ must seem strange and startling to anyone with any knowledge of the history and law of our constitution.... In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the revolution of 1688 any such idea has become obsolete.”⁴⁸

Accordingly, the question whether Parliament was fraudulently misled into passing the 1968 Act was immaterial. The court could not, under any guise, ignore the clear provisions of the Act. It could not grant any relief contrary to the terms of the Act. All it can do is to interpret the provisions in a manner that fulfils the will of the sovereign Parliament.⁴⁹ This is what the traditional concept of Parliamentary sovereignty demands.

Lord Reid’s mention of the revolution of 1688 was significant. Although as early as 1485, the law-making authority of Parliament had been accepted,⁵⁰ very serious disputes remained as to the position of Parliament as the **supreme** law-making body of England. By the 17th century, there were three groups of political theorists each of which sought to locate ultimate sovereign power in three different entities. These groups were the royalist theorists, the parliamentary theorists and the common law theorists.

The royalist theorists believed that the King (or Queen) was God’s representative on earth. God bestowed absolute sovereign powers on the King. Therefore, the King was absolutely

⁴⁷ Bold type supplied for emphasis.

⁴⁸ [1974] WLR 208 at 213.

⁴⁹ Although the decision in *Pickin* could be explained in terms of the principle of parliamentary privilege and the reluctance of the court to interfere with the internal workings of Parliament, it is submitted that it simultaneously demonstrated the readiness of the courts to obey every Act of Parliament irrespective of alleged irregularities. This is essentially what the traditional concept of parliamentary sovereignty demands.

⁵⁰ Bradley, A. W. and K. D. Ewing (2003). Constitutional and Administrative Law. Essex, Pearson Education Limited, see p. 49.

supreme and was not accountable to any human institution or body. That meant that the King was unaccountable both to Parliament and to the courts.⁵¹ Perhaps the most significant element of royalist theories was the assertion that the King had certain absolute prerogative powers which were inseparable from the Crown and which he could exercise outside of Parliament. The most significant of these asserted prerogatives was the King's power to suspend, or dispense with, statutes enacted by Parliament.

On the other hand, parliamentary theorists argued that political power was given by God to the community as a whole. For purposes of effectiveness of governance, the community had to delegate governmental powers to the King. However, the King's exercise of governmental powers was subject to the common law, and more importantly, to laws enacted by Parliament, which represented the community. Consequently, the King's prerogative powers could be exercised only as far as Parliament allowed.⁵²

For the common law theorists, it was believed that both Parliament and the King owed their respective authorities to the common law. Therefore, both were subject to the common law. However, common law theorists were not absolutely clear as to whether judges were empowered to review the validity of legislative enactments made by Parliament for being contrary to the common law. As observed by Professor Jeffrey Goldsworthy, writing in the context of 17th century England,

“It is clear that some lawyers did advocate some kind of judicial review of the validity of statute. But disapproval of the idea was much more common, because it was inconsistent with the prevailing hierarchy of political authority, and the principal theories – royalist as well as parliamentary – that sought to justify that hierarchy.”⁵³

⁵¹ Goldsworthy, J. (1999). The Sovereignty of Parliament. Oxford, Oxford University Press. See p. 79 -96.

⁵² Ibid. See pp. 96 – 109.

⁵³ Ibid, at p. 124.

By the 17th century, the two dominant groups of political theorists in England were the royalists and the parliamentarians. Although their differences were deep-rooted, there was a meeting point between the two groups. They both agreed that the King-in-Parliament had absolute law-making power in the sense that the courts could not review the validity of enactments emanating from that body.⁵⁴ The conflict between the two groups related in the main to the disputed exercise of the King's prerogative powers outside of Parliament and without the consent of Parliament. The King's prerogative powers to legislate and govern outside of Parliament, and without the consent of Parliament, was held by royalists to be untouchable even by the King-in-Parliament. The King's exercise of legislative powers in three specific areas appeared to be most contentious. First was the King's power to legislate by way of proclamation. The Statute of Proclamations 1539 had enabled Henry VIII to exercise wide legislative powers without recourse to Parliament. Although in the *Case of Proclamations*⁵⁵, this prerogative power was held to be subject to statute, it appeared that the Stuart Kings continued to make maximal use of it.

The second area concerned the imposition of indirect taxes on foreign trade and defence of the realm. The King asserted a prerogative power to impose taxes on foreign trade⁵⁶ and for purposes of the defence of the realm⁵⁷ without recourse to Parliament, and it would appear, even contrary to statute.

⁵⁴ Ibid. See pp.89 – 90.

⁵⁵ (1611) 12 Co Rep 74.

⁵⁶ See the *Case of Impositions* (Bate's Case) (1606) 2 St Tr 371, where the Court of Exchequer upheld this prerogative power.

⁵⁷ See *Case of Ship Money* (*R v Hampden*) (1637) 3 St Tr 825, where the Court of Exchequer again upheld this prerogative power. It is interesting to note that Parliament asserted its supremacy over the courts by impeaching in 1641 the six judges who decided the case in favour of the Crown.

The third area concerned the Crown's asserted prerogative power to dispense with, or suspend, the operation of statutes enacted by Parliament.

The struggle between the royalists and the parliamentarians came to a head during the reign of Charles I. The struggle led in large measure to the civil war and the eventual defeat and execution of Charles I in 1646 and the abolition of the monarchy during the period of Oliver Cromwell's Republican Protectorate. After Cromwell's death, the monarchy was restored in 1660 and the reign of the Stuart Kings resumed.

As it turned out, the struggle for supremacy between Parliament and the Crown did not end with the civil war and the restoration of the monarchy. James II's ascension of the throne marked a resurgence of Catholicism. The King asserted the long-disputed royal prerogative power to dispense with provisions of the Test Act, which prevented Catholics from holding public offices.⁵⁸ Catholics were appointed into state offices, and correspondingly, Protestants were increasingly being removed from offices.⁵⁹ The birth of a male heir to James II amid fears that Catholicism would in time be firmly rooted in the Kingdom made it imperative for his opponents to act. Seven peers invited James' son-in-law, William of Orange to intervene. By the end of 1688, James II had been defeated and had fled to France. William and his wife Mary were offered the Crown conditional upon respecting the Declaration of Rights the terms of which were eventually incorporated into the Bill of Rights 1689. Clearly, the Bill of Rights was meant to tilt the balance of power between the Crown and Parliament in favour of the latter.

⁵⁸ See the case of *Godden v Hales* (1686) 11 St Tr 1165 where the court upheld a dispensation granted by James II to Sir Edward Hales excusing the latter from certain obligations imposed by the Test Act.

⁵⁹ Keir, D. L. (1969). The Constitutional History of Modern Britain since 1485. London, Adam & Charles Black. See pp. 262 and 264 - 268.

The Bill of Rights is a major constitutional document as far as the constitutional relationship between Parliament and the Crown is concerned. Its principal provisions finally settled the long-running conflicts between Parliament and the Crown concerning the latter's absolute use of the prerogative powers, especially as they concerned the power to dispense with or suspend the operation of statutes, and the power to impose taxes without parliamentary consent.

As can be seen from the foregoing sections, before the revolution of 1688, absolute use of the prerogative powers was pervasive. The Crown's legislative powers competed with that of the King-in-Parliament and were indeed regarded by royalists as in some way superior to statutes. In this situation, Parliament could not be regarded as sovereign and truly supreme. The Bill of Rights made it absolutely clear that Parliament was supreme in every sense of the word. Henceforth, no authority outside of Parliament could compete with it. Article I of the Bill of Rights outlawed the royal prerogative to dispense with or suspend laws without parliamentary consent. Likewise, the imposition of taxes under the prerogative was prohibited by Article IV. Thus, the superiority of the law-making powers of Parliament over the royal prerogative was affirmed. Since the Bill of Rights, it would appear that no prerogative has been held by the courts to be untouchable by Parliament.

In addition to settling the issue of superiority between Parliament and the Crown, the Bill of Rights also defined the constitutional relationship between Parliament and the courts when it established the principle of parliamentary privilege. By Article IX of the Bill of Rights, "freedom of speech and debates in proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." This effectively barred the courts from questioning proceedings in Parliament. Thus, the courts could not entertain any action that

might involve an investigation into matters that occurred in the course of parliamentary proceedings. This was no doubt the basis of the various judicial decisions in which judges have refrained from questioning the validity of parliamentary enactments challenged on grounds of procedural irregularity in the parliamentary process leading up to the enactment of an Act of Parliament.⁶⁰ In particular, the decision of the House of Lords in *Pickin's* case was informed by the House's desire not to interfere with the internal workings of Parliament. An investigation of the sort suggested by the Court of Appeal would necessarily have fallen foul of the principle of parliamentary privilege embodied in the provisions of Article IX of the Bill of Rights.

However, it is submitted that the House of Lords' decision in *Pickin's* case simultaneously demonstrated the readiness of the courts to obey every Act of Parliament, public as well as private, irrespective of alleged irregularities. This is essentially what the traditional concept of parliamentary sovereignty demands.

The second essential element of the *Diceyan* view of the doctrine of parliamentary sovereignty is that the British constitution recognises no form of law that can override an Act of Parliament, or that can be enforced by the courts in contravention of an Act of Parliament. An Act of Parliament is the highest form of law. The application of an Act cannot therefore, be subject to any other form of law, whether common law, previous statute, fundamental rights or principles of international law.

However, views have been expressed in the past, which tended to challenge Dicey's assertion above. In *Dr Bonham's Case*⁶¹, Chief Justice Coke reportedly asserted the existence of

⁶⁰ See *Edinburgh and Dalkeith Railway Co. v Wauchope*, supra, *Lee and Another v The Bude & Torrington Junction Railway Company*, *Ex parte Stevens*, *Ex parte Fisher*, supra, and the decision of the House of Lords in *British Railways Board v Pickin*, supra.

⁶¹ 8 Co. Rep. 113b

judicial power, under the common law, to review, and in appropriate cases, nullify an Act of Parliament found to be against common right and reason:

“And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.”⁶²

This of course, would mean that there are certain rules against which the validity of an Act of Parliament could be determined. This in turn means that courts are imbued with power to judicially review an Act of Parliament and nullify it if found to be inconsistent with norms determined by the courts to be beyond the reach of Parliament. This idea is clearly inconsistent with the traditional concept of parliamentary sovereignty.

It would appear that the idea that judges could invalidate an Act of Parliament for being contrary to some “higher” law enjoyed some support in ancient times. For instance, Blackstone had also commented that the

“... law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original.”⁶³

⁶² At 118a of the Report. See also *Day v Savage* (1615) Hobart 85, at 97, where Hobart C.J. expressed similar views saying obiter: “even an Act of Parliament, made against natural equity, as to make a man judge in his own case, is void in itself...”

⁶³ 1 Bl., Comm. 41. Quoted in Dicey, op. cit., supra, note 1, at p. 62.

However, in modern times, courts have been generally consistent in holding that an Act of Parliament supersedes all other forms of law, and that the courts would obey and apply every Act of Parliament irrespective of any violation of any other form of law.⁶⁴

Accordingly, the courts will obey and apply the provisions of an Act of Parliament notwithstanding any conflict with principles of international law or obligations undertaken under an international treaty or convention. With respect to obligations under an international treaty, it is immaterial that they are incorporated in an Act of Parliament. The courts recognise the right of Parliament to alter the provisions of such an Act even if the resultant effect is a unilateral variation of the terms of the international treaty. A number of cases illustrate this point.

In *Collco Dealings Ltd v Inland Revenue Commissioners*,⁶⁵ certain bilateral agreements were entered into between the United Kingdom and the Republic of Ireland providing for reciprocal tax exemptions in respect of persons and corporate bodies resident in either of the two countries, but not in both countries. These agreements were subject to ratification by legislation in both countries. The United Kingdom incorporated the terms of the agreement in the Income Tax Act of 1952. Paragraph 4 of Schedule 18 to the Act allowed qualified persons claiming tax exemption on the ground of residency in the Republic of Ireland to submit such claims to the Inland Revenue Commissioners.

The appellant, a company registered and resident in the Republic of Ireland, submitted a claim pursuant to the tax exemption provisions contained in the 1952 Act, asking for a refund of tax paid in respect of certain dividends it received for shares held in two British

⁶⁴ See judgment of Lord Reid in *British Railways Board v Pickin* [1974] WLR 208, at 213, paragraphs A - D.
⁶⁵ [1962] AC 1; [1961] 1 All ER 762, [1961] 2 WLR 401.

companies. The Inland Revenue Commissioners rejected the claim on the ground that a later Act of Parliament, the Finance Act (No. 2) of 1955, had, by section 4 (2) thereof, taken away the exemption relied on by the appellant. The company appealed to the Commissioners for the Special Purposes of the Income Tax Acts, which allowed the appeal. However, on appeal to the High Court, the decision of the Inland Revenue Commissioners was restored. The Court of Appeal in turn upheld the High Court's decision.

On further appeal to the House of Lords, it was argued on behalf of the appellant company that applying section 4(2) of the Finance Act 1955 in a manner that removed the appellant's right to tax exemption would amount to a breach of the international agreements between the United Kingdom and the Republic of Ireland, and that this would be inconsistent with the comity of nations and rules of international law. The House was therefore urged to construe the subsection in a way that avoided this result and preserved the terms of the international agreements.

The House of Lords rejected the argument, stating that as the subsection was clear and unambiguous, it could not be disregarded notwithstanding any inconsistency with the international agreements incorporated in the 1952 Act. This meant that inconsistency with international treaty obligations (even if incorporated in a domestic Act) could not be a ground for disregarding the clear terms of a later Act of Parliament.

In *Cheney v Conn (Inspector of Taxes)*⁶⁶ the appellant, a taxpayer, challenged the validity of assessments to income tax and surtax made against him under provisions of the Finance Act of 1964 on the ground that a substantial part of the tax raised under the Act had been allocated to the production of nuclear weapons contrary to international law, in particular, the

⁶⁶ [1968] 1 All ER 779; [1968] 1 WLR 242

Geneva Convention incorporated into United Kingdom law by the Geneva Convention Act of 1957. The Commissioners for the Special Purposes of the Income Tax Acts rejected his argument.

The appellant's appeal to the High Court was dismissed. Ungood-Thomas, J, held that the assessments having been authorised by statute, agreeing with the argument of the appellant would amount to overruling the supremacy of Parliament. According to him,

“What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law in this country, is illegal.”⁶⁷

Clearly therefore, Parliament's legislative power overrides any provision in an international convention entered into by the United Kingdom. So far as an Act of Parliament is clear and unambiguous, it is the duty of the court to obey and apply its provisions irrespective of any inconsistency with such an international convention. As Lord Diplock, LJ⁶⁸ put it in *Salomon v Commissioners of Customs and Excise*,⁶⁹ “the sovereign power of the Queen in Parliament extends to breaking treaties... and any remedy for a breach of an international obligation lies in a forum other than Her Majesty's own courts.”⁷⁰

Again, in accordance with the doctrine of parliamentary sovereignty, a court must apply an Act of Parliament that clearly extends to foreigners and covers acts allegedly committed

⁶⁷ Ibid, at p. 247

⁶⁸ As he then was.

⁶⁹ [1967] 2 QB 116; [1966] 3 All ER 871; [1966] 3 WLR 1223

⁷⁰ See also *Croft v Dunphy* [1932] All ER 154, [1933] AC 156, *R v Secretary of State for the Home Department, ex parte Thakrar* [1974] QB 684; [1974] 2 All ER 261; [1974] 2 WLR 593,

outside the territory of the United Kingdom.⁷¹ Ordinarily, this would be against principles of international law. Nevertheless, a foreigner adversely affected by such an Act cannot plead principles of international law as a legal defence if proceeded against in a court having jurisdiction in the United Kingdom. Certainly, practical considerations may restrain Parliament from enacting a law extending to foreigners living outside the United Kingdom and in respect of acts committed outside the United Kingdom. Enacting such a law may not be in tune with good politics and international relations. Also, there may be practical difficulties in enforcing the law against a foreigner resident outside the country. However, were Parliament to legislate notwithstanding these considerations, the courts would be bound to obey and apply the will of Parliament as contained in the Act.

Even if an international convention were one that protected human rights, the courts would nevertheless obey and apply any statute enacted in clear violation of such a convention.

In *Regina v Secretary of State for the Home Department, ex parte Brind and others*,⁷² a case decided prior to the enactment of the 1998 Act, the applicants challenged the lawfulness of a directive issued by the Secretary of State forbidding the Independent Broadcasting Authority and the British Broadcasting Corporation (BBC) respectively from broadcasting the direct speeches of persons representing certain specified organisations, or persons calling for support for such organisations.

With respect to the Independent Broadcasting Authority, the Secretary of State acted pursuant to section 29(3) of the Broadcasting Act 1981 which provided that “the Secretary of State may at any time by notice in writing require the Authority to refrain from broadcasting any

⁷¹ *Theophile v Solicitor-General* [1950] AC 186; [1950] 1 All ER 405

⁷² [1991] 1 AC 696

matter or classes of matter specified in the notice; and it shall be the duty of the Authority to comply with the notice.”

And with respect to the BBC, he relied on clause 13(4) of the licence and agreement made with the BBC which provided that “The Secretary of State may from time to time require the Corporation to refrain at any specified time or at all times from sending any matter or matters of any class specified in such notice; . . .”

Counsel to the applicants relied *inter alia*, on Article 10⁷³ of the European Convention for the Protection of Human Rights and Fundamental Freedoms and argued that in determining the scope of the powers granted to the Secretary of State by the relevant section of the Broadcasting Act, the court must ensure that Convention rights were not breached. Parliament must be presumed not to have intended the Secretary of State to act in breach of United Kingdom obligations under the Convention.

However, the House of Lords held that the authority conferred on the Secretary of State both by section 29(3) of the Broadcasting Act and by clause 13(4) of the licence and agreement with the BBC were clear and unambiguous. Since an Act of Parliament had not domesticated the Convention (at that time), it formed no part of the law of the United Kingdom. No intention could therefore be imputed to Parliament that in the exercise of his authority pursuant to the Broadcasting Act, the Secretary of State must have regard to the Convention and ensure that Convention rights were not breached.

The only issue to be determined was whether the Secretary of State acted within the authority conferred on him by the Broadcasting Act and the licence and agreement. In deciding to act,

⁷³ Right to freedom of expression.

the Secretary of State could take account of Convention rights. However, he was not bound by law to do so. If the Secretary of State's action was within the purview of the enabling provisions of the Act and the licence and agreement, that would be the end of the matter. The Convention was irrelevant. It had no force of law and could not be resorted to in the determination of the scope of authority of the Secretary of State. As Lord Donaldson of Lynton, M.R. stated:

“...the duty of the English courts is to decide disputes in accordance with English domestic law as it is, and not as it would be if full effect were given to this country's obligations under the Treaty, assuming that there is any difference between the two.”⁷⁴

Ralph Gibson, LJ, amplified the above when he said:

“An international treaty such as the Convention for the Protection of Human Rights and Fundamental Freedoms is made by the executive government. It does not directly affect the domestic law of this country, which can be changed only by Parliament. It is not within the powers of the court, by application of a rule of statutory construction, to import into the laws of this country provisions of a treaty for direct application by the court. Only Parliament can do that. It would be usurpation of the legislative power of Parliament for the court to do more than to construe the legislation which Parliament has passed in order to establish its meaning.”⁷⁵

This case illustrates the point that where wide powers are granted the executive by the provisions of an Act of Parliament clear and unambiguous in their terms, the fact that no precise limits are indicated such that the exercise of the powers granted might infringe on Convention rights is no justification for importing the terms of the Convention in order to restrict the exercise of the powers for the purpose of preventing a possible infringement of

⁷⁴ [1991] 1 AC 696. See also *Salomon v Commissioners of Custom and Excise* [1967] 2 QB 116, *Chindawadra v Immigration Appeal Tribunal* [1988] Imm.A.R. 173; *Garland v British Rail Engineering Ltd* [1983] 2 AC 751. *Fernandes v Secretary of State for the Home Department* [1981] Imm.A.R. 1; *J.H. Rayner (Mincing Lane) Ltd. v Department of Trade and Industry* [1990] 2 A.C. 418; *Regina v Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi* [1976] 1 WLR 979 at p.984

⁷⁵ [1991] 1 AC 696.

Convention rights. In such circumstances, the beneficiary of the power granted must be allowed (subject to scrutiny under English law) the full exercise of his discretionary powers whether such exercise infringes on Convention rights or not.⁷⁶

The decision in *Regina v Lyons and others*,⁷⁷ further demonstrated that the courts would obey an Act of Parliament notwithstanding a clear violation of Convention rights. There, the defendants/appellants had been convicted of various criminal charges. The convictions were based substantially on their own statements obtained by statutory compulsion by inspectors from the Department of Trade and Industry. The statements were admitted in evidence by authority of section 434(5) of the Companies Act 1985.

Subsequently, the appellants each obtained a ruling from the European Court of Human Rights at Strasbourg to the effect that the admission in evidence of the statements obtained under compulsion contravened the appellants' right to a fair trial under Article 6 of the Convention.

Following these rulings of the European Court, the Attorney General issued a directive barring prosecutors from tendering in evidence statements compulsively obtained pursuant to section 434(5) of the Companies Act. Parliament subsequently amended section 434 to satisfy the decision of the European Court.

As a result of the rulings of the European Court, the Criminal Cases Review Commission referred the appellants' case to the Court of Appeal to determine the safety of the convictions.

⁷⁶ However, it has to be noted that with the operation of section 3(1) of the 1998 Act, this assertion may have to be qualified by the directive contained in the subsection.

⁷⁷ [2002] UKHL 447, [2003] 1 AC 976, the facts of which pre-dated the coming into effect of the 1998 Act.

The Court of Appeal had no difficulty in refusing to quash the convictions. It held that since an Act of Parliament had expressly authorised the admission of the compulsively obtained statements, the admission was therefore legal and could not be questioned on grounds of incompatibility with the provisions of the Convention that had no force of law domestically.

On appeal, the House of Lords sustained the decision of the Court of Appeal. It held that section 434(5) of the Companies Act, which authorised the admission in evidence of the statements, was unambiguous. The intention of Parliament was quite clear. It intended such statements to be admissible. The duty of the courts in these circumstances is to apply the law in a way that complies with the intention of Parliament. This is irrespective of whether Convention provisions are infringed. “The will of Parliament as expressed in section 434 trumps any international obligation.”⁷⁸

As can be seen from the above, the case law showed that the courts recognised the power of Parliament to legislate in breach of the Convention rights. This was the result of demands both of the doctrine of parliamentary sovereignty and the principle that international treaties do not have the force of law except to the extent incorporated by an Act of Parliament.

The third element of the doctrine of parliamentary sovereignty as expounded by Dicey is that Parliament can always alter an existing Act by the ordinary means of legislation irrespective of any provision in that Act purporting to restrict the power of future Parliaments in effecting any alteration. In other words, it is impossible for one Parliament to enact legislation restricting the power of its successor Parliament from repealing or amending the Act. Were it

⁷⁸ Ibid, per Rose LJ., in the Court of Appeal; [2002] 2 Cr App R 210, quoted by Lord Bingham of Cornhill at paragraph 10 of the judgment.

to do so, there would be nothing preventing future Parliaments from legislating in breach of the restrictions contained in the Act in question.

Dicey cited a number of historical instances where Parliament had attempted to protect legislative enactments from being altered by succeeding Parliaments. He mentioned in particular, the language used in the Union with Scotland Act 1706 (Act of Union with Scotland) and the Union with Ireland 1800 (Act of Union with Ireland). The language indicated that certain aspects of the Acts were intended to be unalterable. For instance, the Act of Union with Scotland provided for the preservation of the Presbyterian Church in Scotland and required all Scottish professors to subscribe to the Confession of Faith. These provisions amongst others were to be “held and observed in all time coming as a fundamental and essential condition of any treaty or union to be concluded betwixt the two Kingdoms **without any alteration thereof or derogation thereto in any sort for ever.**”⁷⁹

It seemed clear that the Parliament that passed the provisions of the Act of Union with Scotland actually intended those parts of it deemed to be “fundamental and essential” to the Union to be untouchable by future Parliaments.⁸⁰ However, later events proved that this was incapable of preventing a future Parliament from altering the provisions by the ordinary means of legislation. The requirement that all Scottish professors must subscribe to the Confession of faith was repealed by the Universities (Scotland) Act of 1853. The Church

⁷⁹ See Article 25 of Act of Union with Scotland 1706. Bold type supplied for emphasis.

⁸⁰ It is said that pamphlets circulated (in Scotland) at the time of the Acts of Union indicated that there were arguments that the Articles of Union were to be regarded as fundamental; and that the emergent Parliament of Great Britain would have no power to alter the fundamental terms of the Union. See Ford, J. D. (2007). "The Legal Provisions in the Acts of Union." Cambridge Law Journal **66(1)**: 106 - 141, at p. 129-130.

Patronage (Scotland) Act of 1711, which restored lay patronage in Scotland was also, according to Dicey, “a direct infringement upon the Treaty of Union.”⁸¹

Similarly, Article 5 of the Act of Union with Ireland had contained the following:

“That it be the fifth article of Union, that the Churches of England and Ireland as now by law established, be united into one Protestant Episcopal Church, to be called the United Church of England and Ireland; and that the doctrine, worship, discipline, and government of the said United Church **shall be and shall remain in full force for ever**,⁸² as the same are now by law established for the Church of England; and that the continuance and preservation of the said United Church, as the established Church of England and Ireland, shall be deemed and be taken to be an essential part of the Union.”

Here again, the attempt to make the “essential” provisions of the Act unalterable is unmistakable. Again, the attempt was futile as the Irish Church Act of 1869 separated the Irish Church from the Church of England.

It must be noted that neither of the instances concerning the alteration of the provisions of the Act of Union with Scotland and Act of Union with Ireland was challenged and tested in court. However, in more recent times, the validity of an Act of the British Parliament has been challenged in court on the ground that it contravened provisions of the Act of Union with Scotland.

In *MacCormick v Lord Advocate*,⁸³ the petitioners had argued before the Lord Ordinary (at first instance) that if the Royal Titles Act 1953 purported to authorise the Queen to adopt the title “Queen Elizabeth the Second”, the Act would contravene the provisions of Article 1 of

⁸¹ Dicey, A. V. (1959). Introduction to the Study of the Law of the Constitution. London, The MacMillan Press Limited, at p. 66.

⁸² Bold type supplied for emphasis.

⁸³ [1953] S.C. 396

the Treaty of Union between Scotland and England (ratified by the Act of Union with Scotland 1706 and Act of Union with England 1707, separately passed by the Parliaments of England and Scotland); consequently, the 1953 Act was *ultra vires* the legislative powers of Parliament. Article 1 of the Treaty of Union provided as follows:

“That the two Kingdoms of Scotland and England shall upon the first day of May next ensuing the date hereof and forever after be united into one Kingdom by the name of Great Britain and that the ensigns armorial of the said United Kingdom be such as Her Majesty shall appoint and the crosses of St. Andrew and St. George be conjoined in such manner as Her Majesty shall think fit and used in all flags, banners, standards and ensigns both at sea and land.”

The petitioners’ argument was that since by Article 1 above, the United Kingdom came into being on the date appointed in Article 1, and no Queen of the name of Elizabeth had reigned in the new, United Kingdom, until the incumbent, it would be historically wrong to use “the Second” as part of the official title of Her Majesty, and consequently *ultra vires* of Parliament to authorise the use of it.

The Lord Ordinary, Lord Guthrie, promptly dismissed the petitioners’ argument. His Lordship held that section 1 of the Royal Titles Act 1953 authorised the use of such style and titles as Her Majesty may think fit. That being so, the court could not interfere with the will of Parliament: “In my opinion, the petitioners’ propositions in law are unsound and indeed extravagant. No Scottish Court has ever held an Act of Parliament to be *ultra vires*, and it has never been suggested that it could do so.”⁸⁴ While His Lordship appeared to admit that the

⁸⁴ Ibid, see p. 403

doctrine of Parliamentary sovereignty was based on English law, he asserted that the doctrine was “recognised in Scotland as a basic principle of constitutional law.”⁸⁵

On appeal to the Court of Session,⁸⁶ it was held (amongst others) that the Treaty of Union did not prohibit the use of the numeral, “II” as part of the title of Her Majesty. The appeal was consequently dismissed. However, the Lord President, Lord Cooper, criticised Lord Guthrie’s view⁸⁷ of the application of the doctrine of parliamentary sovereignty in Scotland. According to him:

“The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law.... Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done. Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different types of provisions.”⁸⁸

Similar sentiment, such as appears in the dictum of Lord Cooper above⁸⁹ could be found in the dictum of Lord Keith in *Gibson v Lord Advocate*,⁹⁰ another Scottish case in which the validity of an Act of the British Parliament was challenged on the ground that it contravened the provisions of Article XVIII (18) of the 1707 Act of Union (with England). The plaintiff,

⁸⁵ Ibid.

⁸⁶ Before the First Division

⁸⁷ Expressed at first instance

⁸⁸ [1953] S.C. 396, at p. 411

⁸⁹ Op. cit., supra, note 78.

⁹⁰ [1975] S.C. 136

who was Scottish, and skipper and part-owner of a fishing vessel operating in Scottish coastal waters, sought a declaration that in so far as section 2(1) of the European Communities Act 1972 purports to incorporate Article 2 of the European Communities Regulations of 1970 (E.E.C. No. 2141/70) as part of the law of Scotland, the 1972 Act was contrary to the provisions of Article XVIII (18) of the Act of Union 1707, and was therefore null and of no effect.

Article 2 of the 1970 E.E.C. Regulation had required each Member State of the European Communities to ensure that in respect of fishing within its maritime waters, all Member States were afforded equal fishing rights. That meant for example, that any fishing vessel flying the Spanish flag and registered within the European Community must be given equal rights to fish within the maritime waters of every other Member State of the Community as if they were vessels of nationals of those Member States.

Article 189 of the Treaty of Rome provided that “A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.” What this means is that regulations are to be given legal effect in the Member States without the need for domestic legislation. The domestic courts of Member States could give effect to the provisions of a regulation merely by authority of the regulation itself. This therefore imbued the 1970 E.E.C. Regulation above with direct effects in all Member States.

Section 2(1) of the 1972 Act enacted that:

“All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, as in accordance with the Treaties are

without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly....”

Accordingly, the rights conferred on non-United Kingdom fishing vessels by the 1970 E.E.C. Regulation with respect to fishing within the maritime waters of the United Kingdom, by virtue of their being vessels flying the flags of other Member States of the Community, was statutorily recognised. In other words, section 2(1) of the 1972 Act gave legal effect within the United Kingdom of the provisions of the 1970 E.E.C. Regulation requiring fishing vessels of Member States of the Community to be afforded equal fishing rights within the maritime waters of the United Kingdom.

Article XVIII (18) of the 1707 Act of Union had provided as follows:

“That the laws concerning regulation of trade customs and such excises to which Scotland is by virtue of this treaty to be liable be the same in Scotland from and after the union as in England and that all other laws in use within the Kingdom of Scotland do after the union and notwithstanding thereof remain the same as before (except such as are contrary to or inconsistent with this treaty) but alterable by the Parliament of Great Britain with this difference betwixt the laws concerning publick right policy and civil government and those which concern private right that the laws which concern publick right policy and civil government may be made the same throughout the whole United Kingdom **but that no alteration may be made in laws which concern private right except for the evident utility of the subjects within Scotland.**”⁹¹

⁹¹ Bold type supplied for emphasis.

Clearly, the makers of the provision set out above intended that as far as the then existing laws relating to private rights of Scottish subjects were concerned, they would remain unalterable, either by way of amendment or repeal, by the Parliament of Great Britain, unless it could be proved that the alteration was for the benefit of Scottish subjects.

The plaintiff's case was that prior to the 1707 Act of Union, fishing rights within Scottish maritime waters were exclusive to Scottish subjects only. These rights, he argued, were rights conferred by laws concerning private rights within the meaning of Article XVIII (18) of the 1707 Act; as such the British Parliament could not alter them unless it could be shown that the alteration was for the benefit of Scottish subjects. The resultant effect of section 2(1) of the 1972 Act was that it incorporated the 1970 E.E.C. Regulation, which in turn altered the private rights of Scottish subjects to fish *exclusively* in Scottish maritime waters. He contended that allowing foreign vessels to fish in Scottish maritime waters would be to the detriment of Scottish subjects, in particular, Scottish fishermen; therefore, the alteration was not for "the evident utility of the subjects within Scotland." To that extent, section 2(1) of the 1972 Act was contrary to Article XVIII (18) of the 1707 Act of Union and was therefore null and void.

Lord Keith, delivering the judgment of the Court of Session, ruled that control of fishing rights in the maritime waters of Scotland were matters within the purview of public, and not private law as contended by the plaintiff.⁹² Accordingly, the provisions of Article XVIII (18) of the 1707 Act of Union could not apply to section 2(1). He further ruled that "the question whether a particular Act of the United Kingdom Parliament altering a particular aspect of Scots private law is or is not 'for the evident utility' of the subjects within Scotland is not a

⁹² [1975] S.C. 136, at p. 142

justiciable issue in this Court.”⁹³ He predicated his ruling on the ground that the question was political and the Court would not get involved in political matters.

However, Lord Keith was not prepared to express an opinion on the validity of an Act of Parliament abolishing the Court of Session itself, or the Church of Scotland, or supplanting the entirety of Scottish private law with English law. While expressly reserving his opinion, the tone of his statement appeared to suggest that, with respect to the above matters, the Court may not give effect to the doctrine of parliamentary sovereignty merely as a matter of course.

These judicial pronouncements bring to the fore the vexed issue of whether the Parliament of Great Britain which came to life by virtue of the Acts of Union was “born free”⁹⁴ in the sense that it continued to have all the characteristics of a sovereign Parliament unfettered by any legal restrictions in its capacity to make and unmake any laws as it deemed fit, characteristics which were generally accepted to have been enjoyed by the defunct English Parliament immediately before the legal Union of the two Kingdoms.

That a new state had been created out of the Acts of Union can hardly be arguable. One could no longer speak of England and Scotland as separate, independent states having their own Parliaments. In other words, both the English Parliament and the Scottish Parliament ceased to exist as a consequence of the Acts of Union. An entirely new Parliament, the Parliament of Great Britain, came into existence.

There seems to be general agreement amongst writers that the framers of the Treaty and Acts of Union intended certain provisions of the Treaty and the Acts to be fundamental and

⁹³ Ibid, at p. 144

⁹⁴ Phrase derived from J.D.B. Mitchell who argued that Parliament was “born unfree”. See Mitchell, J. D. B. (1968). Constitutional Law.

unalterable.⁹⁵ Both the wording of the Acts of Union, as well as the fact that the authority of the emergent Parliament of Great Britain, at least with respect to its powers to make laws for England and Scotland as a whole, was derived from the Acts, clearly indicated that the Acts were meant to take precedence over ordinary legislation. It would seem that the Acts of Union created some sort of hierarchy of laws in the new United Kingdom, with the fundamental provisions of the Acts of Union being at the very top of the hierarchy. However, there is far less agreement on the question whether those supposedly alterable provisions in the Acts of Union had the effect of limiting the law-making powers of the emergent Parliament of Great Britain such that it could not validly legislate contrary to those fundamental provisions.

Elizabeth Wicks has been quoted as stating the view that the present day Parliament of the United Kingdom is “the direct heir of the 1707 legislature” and “therefore empowered and limited by its statutory source.”⁹⁶ Michael Upton holds a similar view, arguing that “the Parliament of the United Kingdom is a creation of statute, and, like any other statutory body, is bound by its constituent charters.”⁹⁷ This analysis of the effect of the Acts of Union on the law-making capacity of the Parliament of the United Kingdom seems to suggest that the Acts of Union can be regarded, at least with respect to its fundamental elements, as a supreme constitution having binding force over Parliament. Further, it suggests that an attendant consequence of the Acts of Union was that the English doctrine of parliamentary sovereignty automatically ceased to apply in relation to the new Parliament of the United Kingdom.

⁹⁵ Ford, J. D. (2007). "The Legal Provisions in the Acts of Union." Cambridge Law Journal **66**(1): 106 - 141. . See also Wicks, E. (2001). "A new constitution for a new state? The 1707 Union of England and Scotland." Law Quarterly Review **117**(January): 109 - 126.

⁹⁶ Bogdanor, V. (2007). "Publication Review of Elizabeth Wicks' The Evolution of a Constitution: Eight Key Moments in British Constitutional History." Law Quarterly Review **123**(July): 480 - 484.

⁹⁷ Upton, M. (1989). "Marriage vows of the elephant: the Constitution of 1707." Ibid. **105**(January): 79 - 103, at p. 79.

Dicey and Rait chose to see the declaration that the fundamental elements of the Acts of Union are unalterable as a warning only that Parliament could not alter them “without grave danger to the Constitution of the country”, rather than as a legal impediment to the capacity of Parliament to repeal or amend them.⁹⁸ As a matter of fact, Dicey had always been of the view that “neither the Act of Union with Scotland nor the Dentist Act 1878 has more claim than the other to be considered a supreme law”.⁹⁹ For Dicey, the argument has always been that Parliament could not bind it itself, and any attempt to do so would fail as a future Parliament is empowered to alter any supposedly unalterable statutory provision in a previous Act of Parliament by the ordinary means of legislation. Scottish lawyers would disagree.

Synthesising earlier arguments developed by Professors T.B. Smith¹⁰⁰, J.D.B. Mitchell¹⁰¹ and D.N. MacCormick¹⁰², Michael Upton argues strongly that the Acts of Union are the sources of legislative authority of the new Parliament of the United Kingdom, and that they bind Parliament such that Parliament’s legislative authority is subject to restrictions imposed by the Acts.¹⁰³ The argument is that being a creature of statute, the new Parliament of Great Britain could exercise no legislative powers outside of what is granted to it by its constituent statute. Therefore, clear and unambiguous provisions which were clearly intended to limit the power of the new Parliament to legislate must be binding. Upton seems to equate the

⁹⁸ See Dicey and Rait: Thoughts on the Union Between England and Scotland (1920), cited in Bogdanor, V. (2007). "Publication Review of Elizabeth Wicks' *The Evolution of a Constitution: Eight Key Moments in British Constitutional History*." Ibid. **123**(July): 480 - 484, at p. 481.

⁹⁹ op. cit., supra, note 1, at p. 145.

¹⁰⁰ Smith, T. B. (1957). "The Union of 1707 as Fundamental Law." Public Law.

¹⁰¹ Mitchell, J. D. B. (1968). Constitutional Law.

¹⁰² MacCormick, D. N. (1978). "Does the United Kingdom have a Constitution?" N.I.L.Q. **1**.

¹⁰³ op.cit. supra, note 97.

constituent nature of the Acts of Union with the idea of a supreme constitution the provisions of which govern the law-making capacity of the new Parliament.

It is submitted that the above analysis of the nature of the Acts of Union fails to take into consideration the context in which they were enacted by the separate Parliaments of England and Scotland. First, it has to be noted that the major consideration in the making of the Acts of Union was not to set out a Constitution (in the ordinary sense of the word), setting out the legal framework by which the main institutions of State (i.e. Parliament, Executive and Judiciary) were to exercise their respective authority; the major aim was simply to legally unite the two Kingdoms which had already been politically united in the Crown. Perhaps, this might explain the difference between the Acts of Union and the Constitution of the United States on the question of the supremacy of their respective provisions over ordinary statutes. The controversy concerning the supremacy of the provisions of the Acts of Union over other statutes suggests that it is difficult to regard the Acts of Union the same way one would regard the Constitution of the United States as being supreme over inconsistent laws passed by Congress. This is in spite of the fact that the Constitution of the United States, like the Acts of Union, has no special provision authorising the courts to invalidate Acts of the Congress of the United States which are determined to be contrary to the Constitution. The fact that there is far less controversy concerning the idea that the Constitution of the United States enjoys supremacy over ordinary statutes might be explained by the nature of the Constitution. The framers set out not merely to create a Union of States, but also to spell out specifically the scope of authority of the main institutions of the Union, that is, the legislature, the executive and the judiciary.

Secondly, before the Acts of Union were enacted, Parliament's legislative authority seems to have been derived, not from statute, but from common law and custom, or convention, both in England and in Scotland. Thus, it can be safely stated that the idea that Parliament's legislative authority could be controlled by statute was not a commonly held notion even in Scotland. While the language used in certain provisions of the Act seemed to support the view that the framers intended them to be unalterable, this was not made unequivocal in the text such that Acts of the emergent Parliament would automatically be rendered void for being in violation of the Acts of Union.

Having regard to the English principle of parliamentary sovereignty, which seems to have survived the Union (at least on the English side), it is quite unlikely that an English judge would strike down an Act of the Parliament of the United Kingdom for being in violation of a fundamental term of the Acts of Union. So far, none has. Even in Scotland, despite the foregoing judicial dicta sympathetic to the idea of the fundamental terms of the Acts of Union being "higher law" beyond the reach of Parliament, it is unlikely that the judges would directly declare an Act of the Parliament of the United Kingdom null and void for having been made in violation of the Acts of Union. Indeed, Lord Cooper's later statement in *MacCormick v Lord Advocate* indicated quite clearly that he himself may not take so drastic a decision:

"Accepting it that there are provisions in the Treaty of Union and associated legislation which are 'fundamental law' and assuming for the moment that something is alleged to have been done – it matters not whether with legislative authority or not – in breach of that fundamental law, the question remains whether such a question is determinable as a justiciable issue in the Courts of either Scotland or England, in the same fashion as an issue of constitutional *vires* would be cognisable by the Supreme Courts of the United States, or of South Africa or Australia."¹⁰⁴

¹⁰⁴ [1953] S.C. 396 at p. 412.

It is worth noting that in the past, provisions which were thought to have been intended by the makers of the Acts of Union to be unalterable have been repealed or altered. For example, Article 25 of the Act of Union with Scotland 1706, which required Scottish professors to subscribe to the Confession of Faith of the Presbyterian Church, has been repealed by the Universities (Scotland) Acts 1853 and 1932 and this has never been invalidated by the courts.

Although, as indicated above, the courts may not frontally attack an Act of the United Kingdom Parliament for being in violation of a fundamental term of the Acts of Union, this does not mean that in the event of such a violation, the courts would be totally incapable of doing anything. There is a case for arguing that the Acts of Union, like the European Communities Act 1972 and the Human Rights Act 1998 (discussed in chapters 4-7), are constitutional statutes having some degree of entrenchment.¹⁰⁵ It may therefore be possible to read into every Act of Parliament an implied provision that the Act is to apply without prejudice to the fundamental terms of the Acts of Union unless Parliament expressly, deliberately, specifically and unequivocally states that it is to apply notwithstanding any violation of the Acts of Union. In this way, a degree of judicial protection could be afforded to the fundamental terms and Parliament would be constrained to consider very carefully the political fall-outs of any such violation before passing legislation.

Dicey also pointed to the Taxation of Colonies Act 1778 as an instance of one Parliament appearing to restrict the power of its successor Parliament to enact legislation as it pleases.¹⁰⁶

Section 1 of the Act provided that Parliament

¹⁰⁵ See *Thoburn v Sunderland City Council* [2002] EWHC (Admin); [2003] QB 151. This case is fully examined in chapter 4..

¹⁰⁶ Dicey, *op. cit.*, *supra*, note 1, at p. 66.

“... will not impose any duty, tax, or assessment whatever, payable in any of his Majesty’s colonies, provinces, and plantations in North America or the West Indies; except only such duties as it may be expedient to impose for the regulation of commerce; the net produce of such duties to be always paid and applied to and for the use of the colony, province, or plantation, in which the same shall be respectively levied, in such manner as other duties collected by the authority of the respective general courts, or general assemblies, of such colonies, provinces, or plantations, are ordinarily paid and applied.”

The language used here is quite categorical. Parliament “will not” legislate to impose tax except as provided by the section. What would happen if Parliament were later to legislate in a manner inconsistent with the terms of the statutory provisions quoted above? Dicey says, “There is under our constitution no legal difficulty in the way of repealing or overriding this Act.”¹⁰⁷ It is submitted that this assertion is correct. Parliament has the power, in accordance with the concept of parliamentary sovereignty, to alter any existing laws in any way it deems fit.

However, it must be pointed out that it is one thing for Parliament to alter what was apparently intended by its predecessors to be unalterable, and another to assert that the courts would obey and apply the alteration. Dicey was unable to point to any judicial authority upholding the power of Parliament to alter supposedly unalterable statutory provisions. Nevertheless, his views appear to have been vindicated by modern judicial decisions.

¹⁰⁷ Ibid, at pp.66-67.

*Ellen Street Estates Ltd v Minister of Health*¹⁰⁸ amply illustrates the fact that the courts recognise the power of Parliament to alter in any way it deems fit any existing legislation irrespective of any provision in that legislation purporting to restrict the power of future Parliaments to legislate in a manner inconsistent with its terms.

The case concerned amongst others, certain provisions of the Acquisition of Land (Assessment of Compensation) Act of 1919 and the Housing Act of 1925. Section 2 of the 1919 Act provided that in assessing compensation for compulsory acquisition of land, the compensation payable shall be the open market value of the land. Section 7(1) of the Act then declared that any other Act dealing with the subject of compulsory acquisition shall be subject to the 1919 Act and shall be rendered ineffective so far as they are inconsistent with the 1919 Act (including, of course, the provisions of section 2 above).

However, section 46(1) of the Housing Act 1925 contained provision for compensation for compulsory acquisition of land that was inconsistent with, and less favourable than, that provided by section 2 of the 1919 Act.

Counsel for the appellant had argued that in so far as the provisions for compensation contained in the 1925 Act were inconsistent with those contained in the 1919 Act, the provisions in the 1925 Act were without any legal effect.

The Court of Appeal rejected this contention as being “absolutely contrary to the constitutional provision that Parliament can alter an Act which it has previously passed.”¹⁰⁹

¹⁰⁸ [1934] All ER 385, [1934] 1 KB 590

¹⁰⁹ Ibid. Per Scrutton, LJ.

The fact that Parliament failed to clearly state in the later Act that it was repealing the earlier Act was immaterial. The court was bound to obey and apply the will of Parliament expressed in the later Act in preference to that expressed in the earlier Act in case of any inconsistency between the two Acts. If counsel's argument were to prevail, the resultant effect would be that the 1919 Parliament would have successfully bound the 1925 Parliament. In that case, the provisions of the 1919 Act dealing with assessment of compensation for compulsory acquisition of land would be unchangeable.

This case illustrates the fact that as between competing Acts of Parliament dealing with the same subject matter, the courts would, as a matter of principle, rule in favour of the later in time. Entrenchment provisions contained in the earlier Act cannot render ineffective the provisions of the later Act. The courts' attitude is that British constitutional law abhors entrenched laws. In the United Kingdom, all Acts of Parliament enjoy equal status. No Act is imbued with a special, constitutional status higher in hierarchy to other Acts. In general therefore, the courts would refuse to recognise such entrenchment provisions as having any legal effect upon the absolute power of Parliament to legislate in any manner as it deems fit.¹¹⁰

One remarkable thing about the decision in the *Ellen Street* case is the fact that the earlier 1919 Act **expressly** stated that other Acts must be construed subject to its terms.¹¹¹ This did not prevent the court from giving full effect to the later 1925 Act despite the inconsistency between the two.

¹¹⁰ See also *Vauxhall Estates Ltd v Liverpool Corporation* (1931-32), Vol. XLVIII, The Times Law Report 100; [1932] 1 KB 733

¹¹¹ See section 7(1). Cf. section 2(1) and (4) of the European Communities Act 1972 and section 3(1) of the Human Rights Act 1998 discussed in chapters 4 - 7.

Another remarkable thing about the decision was that the application of the principle of implied repeal was sufficient to displace the terms of the 1919 Act and give full effect to the conflicting provisions of the 1925 Act.¹¹²

Sometimes, the political reality of a state of affairs might be so overwhelming that Parliament might not exercise its legislative power to enact legislation changing the status quo. For example, it has been suggested that due to the political realities flowing from the Statute of Westminster of 1931, and the various Independence Acts, for example the Nigeria Independence Act of 1960, the British Parliament effectively bound itself and its successors from enacting future legislation in violation of the terms of those Acts.

The Statute of Westminster conferred virtual legislative autonomy to the Dominions listed in section 1 of the Act, that is, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Irish Free State and Newfoundland. Section 2(1) of the Act declared that

“No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.”

¹¹² Cf position with regard to the European Communities Act 1972 and the Human Rights Act 1998 discussed in chapters 4 - 7.

Section 4 went on to restrict the power of the British Parliament to legislate for the Dominions in the following terms:

“No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.”

The legislative objective of these provisions is quite clear. Future Parliaments were required not to legislate contrary to the terms of the Act. The question is, bearing in mind the doctrine of parliamentary sovereignty, how would the courts of the United Kingdom react to an Act of the British Parliament enacted in violation of the terms of the Statute of Westminster, for example, in breach of the provisions of section 4 thereof, which forbade the British Parliament from legislating for the Dominions except with the consent of the Dominion concerned?

In *British Coal Corporation v The King*,¹¹³ Viscount Sankey, LC,¹¹⁴ expressed the following opinion:

“It is doubtless true that the power of the imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the Statute. But that is theory and has no relation to realities.”

¹¹³ [1935] A.C. 500

¹¹⁴ Delivering the judgment of the Privy Council, the panel of which included Lords Atkin, Tomlin, MacMillan and Wright.

Upon a cursory reading of Viscount Sankey's statement above, it would appear that he was of the opinion that when faced with such a situation, the courts might be inclined to give effect to the political reality notwithstanding the constitutional position that British courts must obey and apply all Acts of the British Parliament without question. Indeed, in *Blackburn v Attorney-General*,¹¹⁵ Lord Denning appeared to have given Viscount Sankey's statement this interpretation when he stated:

"We have been brought up to believe that, in legal theory, one Parliament cannot bind another and that no Act is irreversible. But legal theory does not always march alongside political reality. Take the Statute of Westminster 1931, which takes away the power of Parliament to legislate for the Dominions. Can any one imagine that Parliament **could**¹¹⁶ or would reverse those laws and take away their independence? **Most clearly not.**¹¹⁷ Freedom once given cannot be taken away. Legal theory must give way to practical politics."¹¹⁸

It is submitted however, that such an interpretation would be wrong. Politics should not trump basic constitutional doctrines such as the concept of parliamentary sovereignty. As

Lord Reid stated in *Madzimbamuto v Lardner-Burke*¹¹⁹

"It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political or other reasons against doing them are so strong that most people would regard them as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid."

¹¹⁵ [1971] WLR 1037

¹¹⁶ Bold type supplied for emphasis

¹¹⁷ Bold type supplied for emphasis

¹¹⁸ Ibid, at p. 1040, paragraphs E - G

¹¹⁹ [1968] 3 WLR 1229, at 1248

The proper interpretation of Viscount Sankey's statement should be that Parliament has, by the terms of the Statute of Westminster, imposed a political self-restraint, which future Parliaments are unlikely to breach. However, this self-restraint is one that could not be legally enforced in the courts of the United Kingdom. Therefore, were Parliament to legislate in breach of the terms of section 4 of the Statute of Westminster, there would be no valid principle of law upon which to sustain the argument that British courts could ignore or refuse to obey the latest will of Parliament in accordance with the doctrine of parliamentary sovereignty.

This issue as to whether a subsequent Act of the Parliament of the United Kingdom could be rendered void for having been enacted in violation of the terms of section 4 of the Statute of Westminster was argued in the case of *Manuel & Others v Attorney General*.¹²⁰ Sir Robert Megarry's judgment, delivered at first instance in that case, can be regarded as a classic illustration of the traditional concept of parliamentary sovereignty.

The Indian peoples of Canada had been granted certain constitutional rights by the British North America Acts of 1867 – 1930.¹²¹ By the provisions of the Statute of Westminster 1931, the British Parliament conferred virtually autonomous legislative powers to the Dominion of Canada subject to the condition stipulated in section 7(1) of the Act, which was that nothing in the Act "shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts 1867 to 1930 or any order, rule or regulation made thereunder." And as stated above, section 4 of the Statute of Westminster 1931 required that

¹²⁰ [1982] 3 W.L.R. 821

¹²¹ See section 1 of the British North America Act 1930 and the schedule to the Act.

for future Acts of the British Parliament to apply to Canada, such Acts must expressly state that Canada requested and assented to their enactment.

The British Parliament enacted the Canada Act 1982. The preamble to this Act expressly stated that Canada requested, and consented to its enactment. Section 1 of the Canada Act then enacted the Constitution Act 1982, set out in Schedule B to the Canada Act, and section 2 totally removed the power of the Parliament of the United Kingdom to legislate for Canada after the coming into force of the Constitution Act set out in the Schedule. The Constitution Act preserved the existing constitutional rights of the Indian peoples.¹²² However, it provided, under sections 38 to 49, a new procedure for amending the Constitution of Canada, including provisions protecting the rights of the Indian peoples, the effect of which was that the Constitution may now be amended by relevant Canadian authorities, without the British Parliament taking any part in the amendment process.

The implication of this new process of constitutional amendment was that the Canadian authorities alone could now alter the safeguarded rights of the Indian peoples, which hitherto could only be altered by the British Parliament.

Unhappy with the removal of the legislative function of the British Parliament as it concerned the existing constitutional rights of the Indian peoples, the plaintiffs, representing an Indian nation in Canada, filed an action challenging the validity of the Canada Act that brought the Constitution Act into force. Their argument was that “Dominion” as used in section 4 of the Statute of Westminster meant, in relation to Canada, the people of Canada, and that the consent of the Dominion referred to in that section meant the consent of each of

¹²² See sections 25 and 35 thereof.

the constituent entities making up Canada to wit: the Federal Parliament of Canada, each of the provincial legislatures of Canada and the Indian nations of Canada having a separate and special status within the Constitution of Canada. The plaintiffs contended that the British Parliament enacted the Canada Act without the consent of the Indian nations, that section 4 of the Act required this consent, that the Act was to the detriment of the Indian nations because the Constitution Act scheduled to the Canada Act removed the entrenched status of the protected rights of the Indian nations as the British Parliament had no part to play anymore. Accordingly, they argued that the Canada Act was *ultra vires*, null and void.

The Attorney General brought a motion to strike out the plaintiffs' statement of claim on the ground that it disclosed no reasonable cause of action.

Sir Robert Megarry's judgment¹²³ upheld the principle of absolute judicial obedience to Acts of the Parliament of the United Kingdom. He held that the Canada Act, being an Act of the Parliament of the United Kingdom, could not be held invalid. This was an application of the "enrolled Act" rule as stated by Lord Campbell in *Edinburgh and Dalkeith Railway Co. v Wauchope*,¹²⁴ the effect being that, once a bill appears to have been passed by the Commons and Lords and have received the Royal Assent, that is the end of the matter. In those circumstances, a court of law could not embark on any enquiry aimed at determining the validity of the Act.

One very important element of Sir Robert's judgment is his emphasis on the distinction between enforceability of an Act of Parliament on the one hand, and the legal validity of the

¹²³ [1982] 3 W.L.R. 821, at 824 - 831

¹²⁴ [1842] VII Clark & Finnelly, 710

Act on the other hand. Due to political, diplomatic or other practical factors, an Act of Parliament may be impossible to enforce. However, the fact that the Act may, for any reason, be impossible to enforce, does not entitle a British court to declare it invalid, or to refuse to obey and apply it. Thus, in relation to a colony of the United Kingdom, “the English courts will apply the Act even if the colony is in a state of revolt against the Crown and direct enforcement of the decision may be impossible.”¹²⁵ This had been demonstrated by the case of *Madzimbamuto v Lardner-Burke*.¹²⁶

The case originated from the then Southern Rhodesia. The country had been annexed by Britain in 1923 and had the status of a British colony. In 1961, the British Parliament granted the colony a constitution,¹²⁷ which allowed the Rhodesian Government to exercise legislative and executive powers. The constitution provided that the law to be administered in the colony was the law in force in the Cape of Good Hope in June 1891, that law being Roman-Dutch law. On the 11th of November 1965, the Prime Minister of Southern Rhodesia and his cabinet made a unilateral declaration of independence and purportedly severed the colonial relationship the country had with Britain. Following this declaration, the Governor of the colony dismissed the cabinet same day.

On the 16th of November 1965, the Parliament of the United Kingdom enacted the Southern Rhodesia Act, asserting continued sovereignty of the United Kingdom and assuming direct legislative and executive authority over Southern Rhodesia. The Act authorised Her Majesty to legislate for the colony by Order in Council. Consequently, on 18th November 1965, the Southern Rhodesia (Constitution) Order was made. This Order declared void anything done pursuant to any constitution enacted for Southern Rhodesia except as authorised by an Act of

¹²⁵ [1982] 3 W.L.R. 821, at 830.

¹²⁶ [1968] 3 WLR 1229

¹²⁷ Constitution of Southern Rhodesia, 1961 (S.I. 1961, No. 2314)

the United Kingdom Parliament.¹²⁸ The Order also suspended the legislative authority of the Legislative Assembly of the colony.

Disregarding the 1965 Act of the Parliament of the United Kingdom as well as the Order made under it, the Prime Minister and the Legislative Assembly passed a new constitution¹²⁹ and proceeded to govern the country under that constitution.

The Southern Rhodesian Government, acting under the 1965 constitution, issued a detention order against the husband of the appellant. The question arose as to the validity of the order having regard to the provisions of the United Kingdom Parliament's Southern Rhodesia Act of 1965 and the Southern Rhodesia (Constitution) Order made under the Act.

Both the court of first instance (General Division) and the Appellate Division of the High Court of Southern Rhodesia expressed the view that the doctrine of necessity (Roman-Dutch law) required the courts to give effect to a detention order issued by the Rhodesian Government under an appropriate regulation, notwithstanding the 1965 Act of the British Parliament, if the detention order was necessary for the preservation of law and order. This view was based the ground that the "rebel" Government appeared for all practical purposes to be the *de facto* Government in effective control of the country.

The majority of their Lordships¹³⁰ in the Privy Council disagreed. Lord Reid stated that "no such principle could override the legal right of the Parliament of the United Kingdom to

¹²⁸ Section 2(1) of the Order.

¹²⁹ Herein called the 1965 Constitution.

¹³⁰ Lord Pearce dissenting.

make such laws as it may think proper for territory under the sovereignty of Her Majesty in the Parliament of the United Kingdom.”¹³¹

The Privy Council’s decision to obey and apply the relevant provisions of the Southern Rhodesia Act of 1965 was arrived at despite indications that *de facto* control of the country was effectively in the hands of the “rebel” Government and that it might be impossible to effectively enforce the Act within the country. The Privy Council seemed therefore to have recognised a clear distinction between the question of the legal validity of the Act of Parliament on the one hand, and the question of its effectiveness within the territory of Southern Rhodesia on the other hand. It appears therefore, that in general, considerations of effectiveness of legislation would not deter the courts from giving effect to the demands of the doctrine of parliamentary sovereignty.

In the same vein, an Act of the Parliament of the United Kingdom purporting to apply to a foreign sovereign nation may be ignored by that nation and its courts, and may well be impossible to enforce by the British authorities. However, those circumstances could not sustain a claim that the Act is by reason thereof invalid. The duty of the court is only to interpret the law as it is and not to bother about whether the British State could enforce the law. Thus, as Sir Robert states, “legal validity is one thing, enforceability is another.”¹³² The question whether the British State may or may not be able to enforce the provisions of an Act of Parliament is irrelevant to the validity of the Act.

In accordance with legal theory therefore, even a transfer of sovereignty, as evidenced by the various Independence Acts, for example the Nigeria Independence Act of 1960, cannot affect

¹³¹ [1968] 3 WLR 1229 at p. 1253.

¹³² [1982] 3 W.L.R. 821, at 831

the validity of an Act of the British Parliament purporting to revoke the transfer. In *Blackburn v Attorney General*,¹³³ Lord Denning had declared that such “legal theory must give way to practical politics.” It is submitted that while it may well be unthinkable that Parliament would enact any such legislation revoking the transfer of sovereignty to the Nigerian authorities, nevertheless, that in itself cannot change the constitutional law of the United Kingdom, and in particular, the constitutional doctrine that the courts of the United Kingdom obey and apply every Act enacted by Parliament. It is therefore respectfully submitted that Lord Denning’s declaration above must be seen as merely rhetorical; it cannot represent the true state of constitutional law in the United Kingdom, as far as the doctrine of parliamentary sovereignty is concerned.

When the *Manuel*¹³⁴ case went on appeal to the Court of Appeal, the appellate judges avoided a direct determination of the question whether the British Parliament could bind itself as to the manner and form of future legislation, a point contended by the plaintiffs’ counsel. It should be recalled that the plaintiffs had argued that section 4 of the Statute of Westminster had imposed a condition precedent to the validity of future Acts of the British Parliament purporting to extend to Canada, and that that condition required an actual request and consent on the part of the Dominion of Canada (including the Indian nations) as opposed to a mere declaration in the Act of such a request and consent.

The Court of Appeal ruled that section 4 only required that the Act must expressly declare that Canada had requested and consented to the enactment of the Act. The condition was therefore one of formal declaration in the Act itself. The Court of Appeal expressed the view that this was the ordinary and natural meaning of the words used in section 4 and that there

¹³³ [1971] 1 W.L.R. 1037, at 1040

¹³⁴ [1982] 3 W.L.R. 821

was no ambiguity in them. However, this approach to the resolution of the constitutional issue raised by the plaintiffs appears to have been influenced by the principle that courts are not to go behind an Act of Parliament and investigate the processes leading up to the enactment of the Act.

It is submitted that, even assuming that section 4 of the Statute of Westminster had purportedly required an actual consent, it is unlikely that the Court of Appeal would have engaged itself in investigating the fact whether Parliament indeed received the required consent. In accord with the principle stated above, the most likely decision would have been to treat the fact of enactment itself as conclusive of the presence of the required consent.

III. Conclusion

It is submitted that the case law outlined above indicates that in general, United Kingdom courts uphold the traditional doctrine of parliamentary sovereignty. The courts' reaction to primary legislation has almost always been predictable. The courts perceive it as their constitutional duty to obey and apply primary legislation without question. The courts recognise no legal grounds upon which an Act of the sovereign Parliament could be challenged. They recognise that absolute judicial obedience of primary legislation is at the core of the doctrine of parliamentary sovereignty. Accordingly, every new statute enacted by Parliament is given due recognition and applied in line with the intention of Parliament expressed in the statute.

Essential to the traditional doctrine of parliamentary sovereignty is the idea that no Parliament can fetter the power of its successor Parliament to enact legislation in any manner

it deems fit. It is submitted that the case law indicates that the courts embrace this idea. Accordingly, they do not give effect to provisions of primary legislation that purport to restrict the effect of future legislation.¹³⁵ Every Act of Parliament is obeyed and applied notwithstanding any inconsistency with an earlier statute.

The case law also indicates that every Act of Parliament is equal in status to every other Act and could be amended or altered either expressly or by way of implied repeal by a subsequent Act.

As has been stated earlier, while Parliament may enact whatever legislation it pleases, all legislation is subject to judicial interpretation. Nevertheless, it is observed that the main judicial purpose of interpretation of legislation is to ascertain the intention of Parliament in order that the will of the Sovereign Parliament may be fully applied. The next chapter will discuss conventional judicial approaches to statutory interpretation.

¹³⁵ *Ellen Street Estates Ltd v Minister of Health* [1934] All ER 385, [1934] 1 KB 590

CHAPTER 3
CONVENTIONAL JUDICIAL APPROACHES TO STATUTORY
INTERPRETATION

“It is a constitutional platitude that where Parliament makes its intention known, either expressly or by necessary implication, the courts must give effect to what Parliament has provided.”¹³⁶

I. Introduction

In the previous chapter, an attempt was made to outline the traditional concept of parliamentary sovereignty. As have been seen, in general, the courts have been inclined to give unquestioned obedience to primary legislation enacted by the sovereign Parliament. While it is within the purview of Parliament to enact whatever legislation it deems fit, it is the courts that interpret and apply the enactments of Parliament in their constitutional role as adjudicators in disputes between the State and individuals as well as between individuals themselves.

As indicated in the introductory chapter, one of the aims of this study is to examine how the courts’ approach to the interpretation of primary legislation pursuant to the interpretative obligation under section 2(1) and (4) of the 1972 Act and section 3(1) of the 1998 Act differ

¹³⁶ Per Lord Ackner in *R v Hunt* [1987] A.C. 352, 380D

from the usual judicial approaches to statutory interpretation. In order to appreciate the difference in approach, it is necessary to consider conventional judicial approaches.

The aim of this chapter therefore, is to discuss conventional judicial approaches to statutory interpretation, absented the effects of section 2(1) and (4) of the 1972 Act and section 3(1) of the 1998 Act respectively. Specifically, the chapter discusses the principal judicial objective in the interpretation of statutes, the principal as well as further methods of ascertaining the intention of Parliament, and the power of the court in appropriate circumstances to depart from what appears to be the plain meaning of statutory provisions.

It is hoped that the discussions in this chapter would enable proper assessments to be made as to the extent to which the interpretative obligation contained in section 2(1) and (4) of the 1972 Act and section 3(1) of the 1998 Act has led the courts to take a different approach to statutory interpretation in cases falling within the purview of the above enactments.

II. The Main Purpose of Statutory Interpretation

In accordance with the doctrine of parliamentary sovereignty, the courts are obliged to obey and apply the will of Parliament as expressed in an Act of Parliament. Accordingly, when faced with an Act of Parliament, the primary duty of a court of law is to ascertain the intention of Parliament in enacting the Act, and then applying the Act in line with the identified intention of Parliament.

To put it simply therefore, the main judicial purpose of statutory interpretation is to ascertain the intention of Parliament.¹³⁷ It would be an illegitimate judicial exercise for a court involved in the interpretation of a statute to seek anything other than the intention of Parliament in enacting the particular statute under consideration. As Lord Diplock observed in *Duport Steel Ltd v Sirs*,¹³⁸

“Parliament makes the laws, the judiciary interpret them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases), **the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it.**”¹³⁹

When it is said that the duty of the court in statutory interpretation is one of ascertaining the intention of Parliament, an appropriate question that arises is, what is meant by the intention of Parliament? Parliament is composed of hundreds of members both of the House of Commons and the House of Lords. Each and every Member of Parliament may have varying intentions in choosing to vote for the enactment of a particular Act of Parliament, even though their decisions to vote for the enactment coincide. Some members may have voted simply because their Party whip directed them to support the Bill. Others may have voted as a result of pressure from their constituents or other lobbyists. Even amongst those members who may have genuinely considered the merits of the Bill exhaustively before voting, there may be differences of opinion as to the main purpose of the resulting enactment. In the light

¹³⁷See Greenberg, D., Ed. (2004). Craies on Legislation. London, Sweet & Maxwell.
, and Bennion, F. (2008). Bennion on Statutory Interpretation. London, LexisNexis, at p. 469.

¹³⁸ [1980] 1 W.L.R. 142 at 157

¹³⁹ Bold type supplied for emphasis.

of this, it would be unacceptable to equate the intention of individual Members of Parliament with the intention of Parliament as an entity.¹⁴⁰

In its constitutional function as a law-making body, Parliament acts, not as a group of persons, but as an entity. When Parliament decides to regulate the sale of alcohol for example, it does so by means of legislation. There are legislative processes through which the legislation is put, culminating in an Act of Parliament appearing in written form for all to see. What Parliament says is the law with regard to the regulation of the sale of alcohol at any given time is to be found in the body of the relevant enactment under consideration. It has generally been agreed therefore, that the “intention of Parliament” in enacting a particular statute is to be found, not in the words or conduct of individual members of Parliament, but in the words that Parliament as a whole has chosen to express its legislative decision in the Act, that is, the formal, authoritative statutory text. Therefore, as a general rule, when “the intention of Parliament” is mentioned, what it generally means is the intention expressed in the statute itself, which has been appropriately termed the *enacted* intention of Parliament.¹⁴¹

III. Judicial Approaches to Ascertaining the Intention of Parliament

The principal judicial approach to ascertaining the intention of Parliament is to give the plain words used by Parliament in the statute under consideration their natural and ordinary meaning in the context in which they have been used. The underlying rationale for this

¹⁴⁰ Cross, R. (1995). Cross: Statutory Interpretation. London, Butterworths, at p. 24.

¹⁴¹ See Kavanagh, A. (2006). "The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998." Oxford Journal of Legal Studies **OJLS 2006 26 (179)**: 179.

approach seems to be that the words used in the statute are the best indicators of what Parliament intended when it enacted the statute. An Act of Parliament is meant to regulate the activities of all persons and authorities coming within the purview of the Act. Legal certainty demands that when Parliament uses a word or phrase in an Act, it intends that word or phrase to bear the natural and ordinary meaning ascribed to it. It would be irrational to expect the citizen to go in search of some special or alternative meaning of the words used by Parliament in place of what is clearly the natural and ordinary meaning of the words. Lord Diplock made this point when he stated:

“The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining ‘the intention of parliament’; but what this metaphor, though convenient, omits to take into account is that the court, when acting in its interpretative role, as well as when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the state in the exercise of its legislative power and the private citizen for whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive power of the state. Elementary justice or, to use the concept often cited by the European Court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible. The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation.”¹⁴²

The caveat in Lord Diplock's statement above has to be noted. Although the principal judicial approach to interpretation of statutes is to give words used in the statute their natural and ordinary meaning, this approach is to be adopted only as far as the statutory words, construed in the context in which they are situated, are clear and unambiguous and, in the words of

¹⁴² *Fothergill v. Monarch Airlines* [1980] A.C. 251 at 279-280.

Lord Diplock, do not “lead to a result that is manifestly absurd or unreasonable.”¹⁴³ Thus, the courts may search for a more appropriate alternative interpretation where the words used are ambiguous in the sense that they are capable of bearing more than one meaning. In the search for an appropriate meaning, the courts may resort to certain aids to interpretation, some of which are discussed below. Further, even where the words used are apparently clear and unambiguous, a court may depart from the plain meaning ascribable to them if the plain meaning results in absurdity or inconsistency with other parts of the statute.

In *Re Lockwood (deceased); Atherton and Another v. Brooke and Another*¹⁴⁴ Harman J, in interpreting the provisions of section 47(5) of the Administration of Estates Act 1925¹⁴⁵ in the context of the legislative history of the enactment, felt entitled to depart from what appeared to be the plain language of the subsection on the ground that the plain meaning of the provision was absurd and contradictory of section 47(3) of the same Act. The plain meaning of the subsection appeared to disentitle the issue of the uncles and aunts of the whole blood from the residuary estate of an intestate in favour of the Crown as *bona vacantia*, or even in favour of more remote relatives of the intestate. In the circumstances, the learned Judge felt able to ignore parts of the provision in order to eliminate the absurdity and inconsistency with the other provisions of the Act.

The power of a court to depart from, or modify the plain language used in a statutory provision may also be used for the purpose of eliminating an unintelligible meaning and achieving an intelligible one. Thus in *R. v. Oakes*¹⁴⁶ the Court of Appeal substituted the word

¹⁴³ Ibid.

¹⁴⁴ [1957] 3 All ER 520

¹⁴⁵ Added by section 1(3)(c) of the Intestates' Estates Act 1952.

¹⁴⁶ [1959] 2 All ER 92

“and” as it appeared in section 7 of the Official Secrets Act 1920 with the word “or” so as to achieve intelligibility. The section read as follows:

“Any person who attempts to commit any offence under the principal Act (i.e. the Official Secrets Act 1911) or this Act, or solicits or incites or endeavours to persuade another person to commit an offence, or aids or abets **and**¹⁴⁷ does any act preparatory to the commission of an offence under the principal Act or this Act, shall be guilty of a felony or a misdemeanour or a summary offence according as the offence in question is a felony, a misdemeanour or a summary offence, and on conviction shall be liable to the same punishment, and to be proceeded against in the same manner, as if he had committed the offence.”

The appellant had been charged under section 7 above with doing an act preparatory to the commission of an offence under the Official Secrets Act. At the trial, appellant’s counsel had moved to quash the charge on the ground that it disclosed no offence. The trial court rejected this submission and the appellant then pleaded guilty to the charge. On appeal, the issue was whether, having regard to the conjunctive word “and” appearing before the phrase “... does any act preparatory to the commission of an offence under the principal Act”, doing such a preparatory act without more (with which the appellant was charged) would constitute an offence under the section?

Upon a literal reading of the section, doing an act preparatory to the commission of an offence under the Official Secrets Act would appear not to constitute an offence on its own unless the accused person also commits any of the earlier offences mentioned in the section,

¹⁴⁷ Bold type supplied for emphasis.

that is, attempting to commit an offence under the Official Secrets Act, soliciting another to commit, inciting another to commit, or aiding or abetting another to commit an offence under the Act. This literal meaning makes no sense because each of the preceding acts constitutes a complete offence on its own. To achieve intelligibility, “and” had to be substituted with “or” so that doing an act preparatory to the commission of an offence under the Act is itself a separate and distinct offence.

The rationale for this implied power to depart from what appears to be the plain meaning of a statutory provision is that the court is entitled to act on the assumption that Parliament could not have intended its enactment to bear an absurd meaning or to bear a meaning that is inconsistent with other parts of the statute. On this principle, the court may be seen to be exercising an implied authority conferred by Parliament to clear up genuine absurdities and inconsistencies in order to make sense of the enactment.

However, the cases appear to indicate that the identified absurdity or inconsistency must arise from within the four walls of the statute, rather than with reference to other enactments unconnected with the statute under consideration.¹⁴⁸ It is submitted therefore, that where the plain language of a statute appears to be inconsistent with the terms of another statute, resort should be had, not to any perceived power of the court to depart from the clear language of the statute under consideration, but to the principle of implied repeal, in order to resolve the inconsistency. Under this principle, the plain language of a statute found to be inconsistent with another statute must nevertheless be given its plain meaning unless the other statute is later in time, in which case the later statute would be taken to have impliedly repealed the clear but inconsistent provisions of the earlier statute.

¹⁴⁸ See for example, Lord Loreburn LC’s statement in *Vickers, Sons & Maxim Ltd v. Evans* [1910] AC 444 at 445: “We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.”

Again, since the main purpose of statutory interpretation is to ascertain the intention of Parliament and carry out that intention, it would be an illegitimate judicial exercise of power to depart from the clear and unambiguous language of a statutory provision if the meaning of the plain language used is consistent with the intention of Parliament in enacting the statute. Parliament's intention as expressed in a statute might be open to criticism for being unreasonable; however, that by itself would not justify a departure from the plain language of the statutory provision under consideration. This point is illustrated by the House of Lords' decision in *Stock v Frank Jones (Tipton) Ltd.*¹⁴⁹

The case involved the interpretation of paragraph 8 of Schedule 1 to the Trade Union and Labour Relations Act 1974. The material provisions of the paragraph provided as follows:

“(1) The provisions of this paragraph shall have effect in relation to an employee who claims that he has been unfairly dismissed by his employer, where on the date of dismissal he was taking part in a strike or other industrial action.

“(2) If the reason or principal reason for the dismissal was that an employee took part in the strike or other industrial action, the dismissal shall not be regarded as unfair unless it is shown—

(a) **that one or more employees of the same employer (in this paragraph referred to as "the original employer"), who also took part in that action, were not dismissed for taking part in it,**¹⁵⁰ or

(b) that one or more such employees, who were dismissed for taking part in it, were offered re-engagement on the termination of the industrial action

¹⁴⁹ [1978] 1 All ER 948

¹⁵⁰ Bold type supplied for emphasis.

and that the employee was not offered such re-engagement, and that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal or not offered re-engagement was an inadmissible reason ...¹⁵¹

The plaintiff was an employee of the defendant company. A vast majority of the workforce of the company had joined a trade union that was not recognised by the company. Consequently, the company dismissed two of its employees found to have been active in the move to join the trade union. In protest, the plaintiff and a number of other employees went on strike, demanding the re-instatement of the dismissed employees. The company then threatened to dismiss the striking employees unless they returned to work by a given date. Before the date, two of the striking employees returned to work, but the plaintiff and others continued with the strike and were consequently dismissed.

The plaintiff instituted proceedings in the industrial tribunal for unfair dismissal relying on paragraph 8(1)(a) of Schedule 1 to the Trade Union and Labour Relations Act 1974 set out above. She contended that her dismissal was unfair under sub-paragraph (a) above since the defendant company did not dismiss the two employees who had also taken part in the strike but returned to work. The tribunal dismissed her claim on the ground that sub-paragraph (a) did not apply since the two employees in question had stopped taking part in the strike at the time the plaintiff was dismissed. The plaintiff's appeal against the tribunal's decision was upheld. The company then appealed to the Court of Appeal, which dismissed the appeal. The company further appealed to the House of Lords.¹⁵²

¹⁵¹ Dismissal for participation in the activities of an independent trade union constitutes "an inadmissible reason in accordance with paragraph 6(4) and (6) of Schedule 1 to the Act.

¹⁵² [1978] 1 All ER 948

It was argued on behalf of the company that accepting the plaintiff's contention would result in an anomaly whereby the company would be forced to dismiss those employees who had returned to work along with those such as the plaintiff who refused to return to work. Therefore, to avoid such an anomaly, it would be appropriate to read into sub-paragraph (a) above words which would restrict its application to cases where at the date the plaintiff was dismissed, others who were also taking part in the strike at that date were not dismissed along with the plaintiff.

The House rejected this argument. Their Lordships found that the intention of Parliament in enacting the Trade Union and Labour Relations Act 1974 was to prevent the victimisation of workers who take part in industrial actions and that the plain language of the statutory provisions clearly conveyed this intention. According to Lord Scarman,

“If the words used by Parliament are plain, there is no room for the 'anomalies' test, unless the consequences are so absurd that, without going outside the statute, one can see that Parliament must have made a drafting mistake. If words 'have been inadvertently used', it is legitimate for the court to substitute what is apt to avoid the intention of the legislature being defeated: per MacKinnon LJ in *Sutherland Publishing Co Ltd v Caxton Publishing Co Ltd (No 2)* ([1937] 4 All ER 405 at 421, [1938] Ch 174 at 201). This is an acceptable exception to the general rule that plain language excludes a consideration of 'anomalies', ie mischievous or absurd consequences. If a study of the statute as a whole leads inexorably to the conclusion that Parliament has erred in its choice of words, e g used 'and' when 'or' was clearly intended, the courts can, and must, eliminate the error by interpretation. But mere 'manifest absurdity' is not enough: it must be an error (of commission or omission) which in its context defeats the intention of the Act.”¹⁵³

It follows that the detection of absurdity would not by itself alone justify a departure from the plain language of a statutory provision. The absurdity must be one that, if allowed to stand unaltered, would defeat the intention of Parliament. If, taking the statute as a whole, the

¹⁵³ [1978] 1 All ER 948

intention of Parliament is clearly conveyed by the plain words used, the court would be bound to give effect to those words. As Lord Edmunds-Davies put it,

“... dislike of the effect of a statute has never been an accepted reason for departing from its plain language. Holt CJ said nearly three centuries ago: 'An Act of Parliament can do no wrong, though it may do several things that look pretty odd' (*City of London v Wood* ((1701) 12 Mod Rep 669 at 687)). Accordingly, even if one regarded the policy implicit in Sch 1, para 8(2)(a), to the 1974 Act as open to criticism, the statutory language is clear beyond doubt and must prevail.”¹⁵⁴

Furthermore, the power of the court to depart from the clear and unambiguous meaning of a statutory provision is not to be exercised if the purpose is merely to fill a *lacuna* detected in the law. Thus in *Re DWS (deceased)*, *Re EHS (deceased)*, *TWGS v JMG and others*,¹⁵⁵ the Court of Appeal refused an invitation to depart from the plain language of section 47(1)(i) of the Administration of Estates Act 1925 in order to take care of circumstances supposedly unanticipated by Parliament when it enacted the statute.

Section 47(1)(i) read as follows:

“47. (1) Where under this Part of this Act the residuary estate of an intestate or any part thereof, is directed to be held on the statutory trusts for the issue of the intestate, the same shall be held upon the following trusts, namely:-

- (i) In trust, in equal shares if more than one, for all or any of the children or child of the intestate, living at the death of the intestate, who attain the age of eighteen years or marry under that age, **and for all or any of the issue living at the death of the intestate who attain the age of [eighteen] years or**

¹⁵⁴ [1978] 1 All ER 948

¹⁵⁵ All England Official Transcripts, judgment delivered on 09 November 2000.

marry under that age of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking;”¹⁵⁶

The factual background to the legal issue involved in the case was that Mr R murdered his parents, Mr and Mrs S. Both parents died intestate and were survived by their only son Mr R and his own son, T. It was agreed by all parties that the murderer son was, by reason of public policy, disqualified from benefiting from the estate of his parents whom he himself had killed. The question for determination was whether, having been so disqualified, his son, T (i.e. the grandson of the deceased) was entitled to the estate of the deceased under the provisions set out above.

The plain language of section 47(1)(i) clearly indicated that for T to be entitled to the estate of his grandparents through his father, his own father must have predeceased the grandparents. Accordingly, he could not be entitled under the provision interpreted according to its natural and ordinary meaning.

It was however argued on his behalf that the provision ought to be construed as if his father had predeceased his grandparents. If this were done, T would stand entitled and a situation where a more remote relative might benefit in preference to T would be avoided.

¹⁵⁶ Bold type supplied for emphasis.

The Court of Appeal rejected this contention. The Court held that the mere fact that Parliament, when enacting the statute, might not have considered circumstances such as the instant case, where the surviving grandchild's parent did not predecease the grandparent but was disqualified, was no justification for departing from the plain meaning of the statutory provision. According to Aldous LJ, "... it is not open to the Court to disregard the clear meaning of the section, particularly when the result cannot be said to be absurd or contrary to the expressed intention of Parliament."¹⁵⁷

The effect of the Court's decision appears to be that it is no part of the constitutional function of the courts, when interpreting statutes, to distort the language of a clear and unambiguous statutory provision that unequivocally conveys the intention of Parliament, mainly for the purpose of covering circumstances not contemplated by Parliament. Therefore, where a gap is detected in the statute, the court must leave it to Parliament to fill. This is especially so where alteration of the clear words would result in extending or constricting the effect of the statute in a manner that is contrary to the clearly expressed intention of Parliament.

There is a further instance where courts may interpret statutory provisions in a manner that appear to deviate from the plain language of the statute under consideration. Statutes enacted by Parliament may remain in force for several years, even possibly, for hundreds of years. In the course of time, conditions such as social attitudes, scientific advances and linguistic usages may change. It has generally been permissible for a court to adopt an *updating* interpretation of a statutory provision to take account of changed circumstances since the Act was passed, even if, in the process of doing this, the court may inevitably depart from what appears to be the plain meaning of the statutory provision.

¹⁵⁷ All England Official Transcripts, judgment delivered on 09 November 2000.

An example of this can be found in the case of *Royal College of Nursing of the United Kingdom v Department of Health and Social Security*.¹⁵⁸ The case concerned the interpretation of section 1(1) of the Abortion Act 1967, the material part of which provided that “a person shall not be guilty of an offence under the law relating to abortion **when a pregnancy is terminated by a registered medical practitioner**.”¹⁵⁹ At the time the Act was passed, abortions were usually carried out by surgical operations performed almost wholly by a registered medical practitioner. Nurses and other medical support staff took no significant part in the process of aborting a pregnancy.

However, a few years after the Act was passed, a new method, called medical induction, had come into use in aborting pregnancies. This new method involved the administration of a chemical fluid into the pregnant woman’s womb with the aim of inducing a discharge of the unborn child from the womb. The process involved two distinctive stages. A medical practitioner performs the first stage. He inserts a catheter into the body of the pregnant woman. Nurses perform the second stage. They connect a tube to the catheter, and through the tube, they pump the chemical fluid into the woman’s body and this induces the labour by which the unborn child is discharged from the womb. The entire process takes between 18 to 30 hours. It was appreciated that it is the administration of the chemical fluid (done by the nurses), and not the insertion of the catheter (done by the medical practitioner) that actually induces the discharge.

Apparently bearing in mind that the wording of section 1(1) of the Abortion Act 1967 excused only “a registered medical practitioner”, the Department of Health attempted to clarify the law by issuing a circular the material parts of which read as follows:

¹⁵⁸ [1981] AC 800

¹⁵⁹ Bold type supplied for emphasis

“However, the Secretary of State is advised that the termination can properly be said to have been termination by the registered medical practitioner provided it is decided upon by him, initiated by him, and that he remains throughout responsible for its overall conduct and control in the sense that any actions needed to bring it to conclusion are done by appropriately skilled staff acting on his specific instructions but not necessarily in his presence.”¹⁶⁰

This meant that the Department of Health did not consider the role of nurses in the medical induction process, as indicated above, to be unlawful, provided that the entire process was authorised and conducted under the direction and control of a registered medical practitioner.

The Royal College of Nursing challenged this view. It contended that section 1(1) of the Abortion Act 1967 covered only registered medical practitioners and could not be extended to cover the prominent role played by nurses in the medical induction process. They therefore sought a declaration that the Department’s circular was wrong in law. The High Court determined the case in favour of the Department. The Court of Appeal, by a unanimous decision, overturned the High Court’s judgment, expressing the view, (per Sir George Baker) that

“There is no manifest absurdity; on the contrary the provision is clear and understandable. If the intention had been to make lawful the acts of persons participating in or carrying out the termination of a pregnancy on doctors' orders that could have been expressly stated either as the department suggest the section should be read, or by some other appropriate words....”¹⁶¹

¹⁶⁰ Quoted in [1981] AC 800

¹⁶¹ [1981] AC 800

On appeal to the House of Lords, the Court of Appeal's judgment was in turn set aside by a majority of 3-2. The principal reason for the majority decision was that in passing the Abortion Act 1967 and requiring that permissible abortions be carried out in National Health Service hospitals or private clinics specially approved for the purpose by the appropriate minister, Parliament contemplated that the treatment resulting in the abortion would normally be carried out as a team effort, with a registered medical practitioner leading other doctors, nurses and other support staff carrying out their respective duties in accordance with accepted medical practice. Therefore, as far as a registered medical practitioner authorises the abortion, takes responsibility for the entire process and remains in control throughout the process leading up to the discharge of the unborn baby, the resulting termination of the pregnancy can properly be deemed termination by the registered medical practitioner in accordance with section 1(1) of the Abortion Act 1967.

Although the main reason for the majority decision appeared to be that the changed conditions (i.e. the new medical induction) came within the *contemplation* of Parliament when it enacted the Abortion Act 1967, the cases suggest that is not the only condition that may justify the court in extending the clear meaning of a provision in the statute under consideration. Where, taking the statute as a whole, and read in appropriate context, the statutory provision could be extended to cover the new development without distorting the underlying purpose of the statute, it is permissible for the court to construe the provision so as to cover the new development even though this may appear to be a departure from the plain meaning of the statutory words.

Indeed, this point was made in the minority judgment of Lord Wilberforce where he expressed the view that the expressed meaning of a statutory provision could be extended to

cover a new state of affairs if they come within the parliamentary intention or the underlying policy or purpose of the statute.¹⁶²

Thus, in *R v Ireland; R v Burtow*,¹⁶³ where the court had to construe the meaning of “grievous bodily harm” and “actual bodily harm” in sections 20 and 47 respectively of the Offences against the Person Act 1861 in the light of current scientific knowledge of the link between psychiatric injury and the human body, the House of Lords decided that the statutory phrases (i.e. “grievous bodily harm” and “actual bodily harm”) could be extended to cover psychiatric injury even though, as Lord Steyn put it, “The proposition that the Victorian legislator when enacting ss 18, 20 and 47 of the 1861 Act would not have had in mind psychiatric illness is no doubt correct.” The important consideration is that the extended interpretation of the statutory phrases fit into the context of the 1861 statute and is in tune with the general legislative purpose of the statute.

As exemplified by the above cases, while the principle, that the court may extend the expressed meaning of a statutory provision to accommodate changed circumstances, has been generally accepted, it is however difficult to decide which new development comes within the contemplation of Parliament, or within the underlying intention, policy or purpose behind the statute. It would appear that no hard and fast rule has been formulated to determine the nature of circumstances that could justify an extension of the clearly expressed meaning of a statutory provision. Each case may have to be decided on its own merits. However, it appears that flexible words are more susceptible to judicial extension beyond their ordinary and natural meanings in order to accommodate changed circumstances.

¹⁶² [1981] AC 800

¹⁶³ [1997] 4 All ER 225

A good example is the term “family” which meaning has been judicially extended from time to time in order to accommodate changing social attitudes.¹⁶⁴ The term, in ordinary English language usage, usually referred to a person belonging to a unit consisting of a husband and wife and their issues, although it may sometimes include extended relatives such as aunts, uncles, nieces and nephews. However, in *Fitzpatrick v Sterling Housing Association Ltd*,¹⁶⁵ a case decided in 1999, the House of Lords had to decide the question whether a same-sex partner was capable of being a member of his or her partner’s family for the purposes of paragraph 3 of Schedule 1 to the Rent Act 1977. By a majority of 3-2,¹⁶⁶ the House held that homosexual partners living and sharing their lives together in a stable relationship characterized by mutual inter-dependence could validly come within the term “family” for the purposes of the Rent Act 1977. The majority was of the view that social attitudes toward homosexuality had changed over the years and an updating approach in the interpretation of the term was necessary in order to accommodate current state of affairs. According to Lord Clyde,

“The concept of the family has undergone significant development during recent years, both in the United Kingdom and overseas. Whether that is a matter for concern or congratulation is of no relevance to the present case, but it is properly part of the judicial function to endeavour to reflect an understanding of such changes in the reality of social life. Social groupings have come to take a number of different forms. The form of the single parent family has been long recognised. A more open acceptance of differences in sexuality allows a greater recognition of the possibility of domestic groupings of partners of the same sex. The formal bond of marriage is now far from being a significant criterion for the existence of a family unit. While it remains as a particular formalisation of the relationship between heterosexual couples, family units may now be recognised to exist both where the principal members are in

¹⁶⁴ For decisions demonstrating the flexible nature of the word “family,” see the following cases: *Gammans v Ekins* (1950) 2 All ER 140; (1950) 2 KB 328; *Dyson Holdings Ltd v Fox* [1975] 3 All ER 1030, [1976] QB 503; *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257; *Barclays Bank Plc v O’Brien* [1993] 4 All ER 417; *Brock v Wollams* [1949] 1 All ER 715; *Price v Gould* (1930) 143 LT 333; *Ross v Collins* [1964] 1 All ER 861; *Watson v Lucas* [1980] 3 All ER 647; *Hawes v Evenden* [1953] 2 All ER 737; *Chios Property Investment Co. Ltd v Lopez* (1987) 20 HLR 120; *Jones v Whitehill* [1950] 2 KB 204.

¹⁶⁵ [1999] 4 All ER 705, [1999] 3 WLR 1113

¹⁶⁶ With Lord Hutton and Lord Hobhouse dissenting

a heterosexual relationship and where they are in a homosexual or lesbian relationship.”¹⁶⁷

A number of factors appeared to have influenced the decision of the majority. First, the term, “family” had no precise statutory definition. It was flexible in nature and thus amenable to judicial modification. Secondly, there was the need for the law to keep up with changing social attitudes affecting the traditional family. With the term remaining statutorily undefined, judges must assume the responsibility to adopt an *updating* approach to its interpretation in the light of current state of affairs. Thirdly, and perhaps most importantly, the extended interpretation appeared not to have negated the underlying purpose of the Rent Act 1977, which was to provide statutory protection (security of tenure) to “those closely bound”¹⁶⁸ to the tenant to enable them continue the tenancy after the death of the tenant.¹⁶⁹

However, Lord Hutton felt that such an extension, as was sanctioned by the majority, was an improper usurpation of parliamentary functions.¹⁷⁰ He appeared to contend that the question before the House involved social policy issues requiring appropriate parliamentary debates.

The division in the House exemplifies the difficulty in determining how far a court could go in adopting an *updating* interpretation. It is suggested that, in addition to ensuring that any extended interpretation is in harmony with the underlying purpose of the statute under consideration, the court should also consider whether considerable public policy issues requiring parliamentary attention is involved. It is submitted that the thin line between

¹⁶⁷ [1999] 4 All ER 705

¹⁶⁸ Ibid. Per Lord Clyde

¹⁶⁹ It could be said that the imminent coming into effect of the Human Rights Act 1998 might have also influenced the decision. As will be seen in chapter 6 below, when the 1998 Act became operational, the meaning of the word, “couple”, which traditionally referred to two persons of opposite sex, was judicially extended to include, in appropriate circumstances, two persons of the same sex, in order to conform with the demands of the Convention rights incorporated by the 1998 Act.

¹⁷⁰ See dissenting judgment, [1999] 4 All ER 705, [1999] 3 WLR 1113

legitimate judicial power of adopting an *updating* interpretation and illegitimate judicial legislation is likely to be crossed if the court dabbled into matters of state policy more appropriate for executive and/or legislative action.

As has been observed, the main purpose of statutory interpretation is the ascertainment of legislative intention. In seeking to discover the intention of Parliament in enacting a statute, it would appear that courts are increasingly adopting what has come to be termed a purposive approach to interpretation. Indeed, the Law Commission, in its report published in 1969, recommended this approach. The Commission advised that “a construction which would promote the general legislative purpose underlying the provision in question is to be preferred to a construction which would not.”¹⁷¹

In *Pepper v Hart*, Lord Griffiths confirmed this contemporary approach when he said, “The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.”¹⁷²

Essentially, the approach involves investigating the legislative history of the statutory provision under consideration and identifying from the available material the mischief or problem, which the statute sought to remedy, and the means chosen to deal with it. Considering the entirety of the legislative history may enable the court to identify the rationale behind the enactment in question.

¹⁷¹ Law Commission Report (1969) (Law Com. No. 21)

¹⁷² [1993] 1 All ER 42 at 50, [1993] AC 593 at 617.

Cross¹⁷³ outlined legislative history as including legislative antecedents, pre-parliamentary materials and parliamentary materials. The legislative antecedents of the statutory provision under consideration refer to related statutory provisions in previous enactments. These may be extant or repealed. An examination of them may give valuable indications of the real purpose of the statute under consideration, and consequently the true construction of the statutory provision in question.

As the term indicates, pre-parliamentary materials refer to relevant materials preceding the introduction of the Bill into Parliament. These include white papers, reports of committees and commissions (containing reviews of various policy matters and recommendations for legislative changes). Reference to pre-parliamentary material can be useful as evidence indicative of the mischief that the statute was meant to deal with.¹⁷⁴ Identification of the mischief may in turn be a useful guide to identifying the purpose of the statute.

Lastly, parliamentary materials include the draft Bill introduced into Parliament and the various amendments made to it in the course of parliamentary proceedings, reports of parliamentary committees as well as parliamentary debates (*Hansard*). As a rule, parliamentary debates are not to be used for the purpose of identifying the intention of Parliament in enacting legislation.¹⁷⁵ However, in *Pepper v Hart*,¹⁷⁶ the House of Lords created an exception to this exclusionary rule. In that case, Lord Browne-Wilkinson proposed that:

¹⁷³ Cross, R. (1995). Cross: Statutory Interpretation. London, Butterworths.

¹⁷⁴ See *Eastman Photographic Materials Co. Ltd. v. Comptroller-General of Patents, Designs and Trademarks* [1898] A.C. 571, *Assam Railways and Trading Co. Ltd. v. Commissioners of Inland Revenue* [1935] A.C. 445, 457-458.

¹⁷⁵ See *Beswick v Beswick* [1968] AC 58, *Davis v Johnson* [1979] AC 264, *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191

¹⁷⁶ [1993] 1 All ER 42 at 50, [1993] AC 593 at 617

“...the exclusionary rule should be relaxed so as to permit reference to Parliamentary materials where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear.”¹⁷⁷

In the case, the House of Lords relied on a ministerial statement made in the course of parliamentary debates on the Bill, which became the Finance Act 1976, for the purpose of resolving the ambiguity thought to be present in section 63 of the Act.

As has been observed, the purposive approach involves carrying out an investigation into the legislative history of the statutory provision under consideration in order that the intention of Parliament may be discovered. Therefore, it is submitted that it would be improper for courts to resort to legislative history unless the intention of Parliament is not manifestly clear from the plain words used, or the plain words lead to an absurd result. As Lord Browne Wilkinson stated in the above quoted passage, reference to parliamentary materials could be had where “legislation is ambiguous or obscure, or leads to an absurdity.” It is submitted that this statement applies with equal force to other forms of legislative history. It is submitted that where the plain words used in the statute in question clearly conveys the intention of Parliament, there should be no need for the court to delve into legislative history. Legislative history ought not to be used for the purpose of discrediting the unambiguous meaning of a statutory provision which meaning is not in any way absurd. Legislative history should be used as a means of confirming the most appropriate meaning (i.e. that which better fulfils the legislative purpose) amongst two or more possible meanings of the statutory provision.

¹⁷⁷ [1993] 1 All ER 42 at 69, [1993] AC 593 at 640

In addition to the various judicial approaches discussed above, courts also resort to certain presumptions as aids to ascertaining the intention of Parliament or resolving doubtful statutory provisions.

For example, when faced with the interpretation of a statute touching on the fundamental rights of the individual, as a general rule, the courts proceed on the presumption that Parliament does not intend to trample on, or in any way abridge, those rights. Therefore, as a general rule, where a statutory provision is ambiguous in the sense that it is capable of two or more meanings, that which preserves the fundamental rights of the individual is to be preferred.¹⁷⁸ Further, it may be safely stated that even where statutory words are apparently clear, the courts may adopt a restrictive approach to interpretation in order to ensure that fundamental rights are not abrogated by the state. As Laws J (as he then was) stated in *R v Lord Chancellor, ex parte Witham*, fundamental rights “cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose *vires* in the main legislation specifically confers the power to abrogate.”¹⁷⁹ In other words, in the absence of express words taking away the fundamental rights of the individual, there may be scope for a restrictive interpretation, which preserves those rights.

Conversely, the presumption that Parliament does not intend to abrogate fundamental rights may be defeated by express words or by necessary implication. Accordingly, where Parliament expressly permits the abrogation of fundamental rights or authorises such

¹⁷⁸ However, see *Liversidge v Anderson* [1942] AC 206, where the majority expressed the view that there should be no special presumption in favour of liberty when the safety of the state (in wartime) was involved. In the case, the House of Lords (by a majority of 4 - 1) interpreted a statutory provision held to be ambiguous in a manner that allowed the state to take away the liberty of the individual without trial. The House appeared to have been influenced by the fact that it was wartime, the enactment in question was of a temporary nature and the detention authorised was preventive and not punitive.

¹⁷⁹ [1998] QB 575, [1997] 2 All ER 779, [1998] 2 WLR 849

abrogation by necessary implication, the courts would have to bow to the terms of the statute.¹⁸⁰

Again, in interpreting legislation touching on the obligations of the United Kingdom under international law or an international convention, as a general rule, the courts proceed on the presumption that Parliament intends to fulfill its obligations. Therefore, where there is an ambiguity in such a statute, that meaning which best fulfills the obligations of the United Kingdom would be preferred. However, where the statute breaches those obligations in clear and unambiguous terms, there can be no recourse to the presumption. In those circumstances, the court may not depart from the terms of the statute under the guise of interpretation. The court has a constitutional duty to apply the terms of the statute.¹⁸¹

IV. Conclusion

In this chapter, it has been shown that the main object of statutory interpretation is the ascertainment of parliamentary intention. It is seen that as a general rule, plain words are given their natural and ordinary meaning in the context in which they are used. Where the statutory words are clear and unambiguous, and conveys the intention of Parliament in enacting the statute in question, there is generally no need for the court to resort to other means of ascertaining the intention of Parliament. In such a case, it is the duty of the court, in accordance with the doctrine of parliamentary sovereignty, to obey and apply the will of Parliament as manifest in the statute.

¹⁸⁰ See *Regina v Secretary of State for the Home Department, ex parte Brind and Others* [1991] 1 AC 696

¹⁸¹ See *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116; [1966] 3 All ER 871; [1966] 3 WLR 1223

However, the cases show that where a statutory provision is ambiguous, or the clear words used lead to an absurdity, the courts may resort to the several other means (discussed above) of ascertaining the intention of Parliament.

It is submitted that inconsistency between the plain words of the statutory provision under consideration and the terms of a previous statute is not to be regarded as an ambiguity entitling the court to depart from the plain language of the statute. In such a case, it is submitted that the principle of implied repeal ought to be activated in resolving the inconsistency. By that principle, the statute earlier in time is impliedly repealed by the statute later in time to the extent of the inconsistency.¹⁸²

On the whole, a departure from the plain language of a statutory provision, which is not ambiguous in the context of the statute, and leads to no absurd result, is, it is submitted, an affront to the sovereignty of Parliament.

In the next chapters, judicial approaches to the interpretation and application of primary legislation pursuant to the provisions of section 2(1) and (4) of the 1972 Act and section 3(1) of the 1998 Act will be examined. The chapters will focus specifically on how the courts have used their interpretative powers in a manner that differs considerably from the conventional approaches that have been discussed in this chapter. Furthermore, the chapters will examine how the courts treat parliamentary intention in particular, and how this impacts on their attitude to the traditional concept of parliamentary sovereignty.

¹⁸² See *Ellen Street Estates Ltd v Minister of Health* [1934] All ER 385, [1934] 1 KB 590

CHAPTER 4
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I. Introduction

The principal aim of this chapter is to examine judicial approaches to the interpretation and application of primary legislation pursuant to the interpretative obligation contained in section 2(1) and (4) of the 1972 Act. In particular, the chapter will examine how the courts react to primary legislation found to be in conflict with directly effective Community law. The extent to which United Kingdom courts are prepared to accord primacy to directly effective Community legislation over domestic primary legislation will be discussed. An analysis of the possible theoretical explanations for the judicial acceptance of the primacy of directly effective Community law will be made. Furthermore, the extent to which United

Kingdom courts are prepared to ensure that the demands of Community Directives are effectively complied with when interpreting national legislation (including national primary legislation) will be examined. It will be argued in this chapter that, while the courts seem to continue to endorse the traditional concept of parliamentary sovereignty, in reality the cases indicate that the interpretative obligation contained in section 2(4) has enabled judges to interpret and apply primary legislation in a manner that challenges the traditional concept of parliamentary sovereignty for all practical purposes.

II. Legal and Constitutional Background to the Enactment of Section 2(1) and (4)

The provisions of section 2(1), (2) and (4) of the 1972 Act (reproduced in Appendix 1) were an attempt by the Government and Parliament to meet the constitutional challenges posed by United Kingdom membership of the European Communities. The challenges concerned in particular the emergence of a new legal order to which the existing United Kingdom constitutional framework must conform. This new legal order consists mainly of three principles vital to the sustenance of Community law. These are the European principles of direct applicability, direct effect and supremacy of Community law over the national law of Member States of the Community.

It is necessary at the outset to clarify in particular what the terms, “direct applicability” and “direct effect” (as well as the related term, “indirect effect”) refer to in order to eliminate possible confusion in the usage of the terms. The clarification is also important because, as

will be seen later in this chapter, the approach of the United Kingdom courts in the interpretation of national legislation differ, depending on whether the Community measure involved is one that is directly applicable or otherwise.

In simple terms, a Community measure must be regarded as directly applicable if it is to apply as law within the domestic legal order of the Member States of the Community without further national legislative measures on the part of the Member States. In other words, a directly applicable Community measure automatically becomes law within the domestic legal systems of the Member States simply by virtue of its nature. For its operation as law within the domestic system, there needs be no implementing measure on the part of a Member State. Under Article 189 of the Treaty of Rome¹⁸³, Community measures take different forms, namely, regulations, directives, decisions, recommendations and opinions. Regulations are of general application. They are binding in their entirety and are expressly stated by the Treaty to be directly applicable in all Member States of the Community. Regulations are the only Community measures that are expressly stated by the Treaty to be directly applicable in the sense that no further national legislative measures are required for them to be relied upon as law within the domestic legal system of the Member States. However, the European Court has made it quite clear that the Treaty provisions themselves may also, depending on the nature of the provision concerned, be directly applicable in the same way as a regulation is directly applicable under Article 189 mentioned above.¹⁸⁴ Thus, where, for example, as was the case in *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (van Gend Case)*¹⁸⁵, the Treaty provision concerned (Article 12) is of a clearly prohibitive nature, the provision is directly applicable

¹⁸³ Now Article 249

¹⁸⁴ See *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* Case 26/62, judgment delivered on 05 February 1963.

¹⁸⁵ Ibid.

such that no further national enactment is required for the prohibition contained in the provision to operate as law within the domestic legal system of the Member States.

Section 2(1) of the 1972 Act adequately describes the character of Community measures that are directly applicable within the domestic legal order of the United Kingdom. All Community legislation “as in accordance with the Treaties are without further enactment to be given legal effect or be used in the United Kingdom shall be recognized and available in law....”

A Directive is binding only as to the result to be achieved, the choice of form and methods of achieving the end result being left to the Member States to which it is addressed to determine.

A decision is binding in its entirety upon those to whom it is addressed, while recommendations and opinions have no binding force.

The fact that Article 189 stipulates that a Regulation is binding in its entirety indicates that it is enforceable and may be relied upon in legal proceedings by individuals within the domestic legal order of Member States. In this sense, Regulations, which by definition under Article 189 are directly applicable, would seem to be also, by their very nature, directly effective. Direct effect refers to the notion that individuals can apply to enforce in their own personal capacity rights and obligations derived from Community law in legal proceedings brought before domestic courts of Member States. Thus, while it may be the case that directly applicable Community legislation are usually also directly effective, the two terms are not synonymous. Directives are not directly applicable in the sense in which Regulations, or relevant provisions of the Treaty itself, are directly applicable. This is because national

legislative measures are generally required in order for the provisions of a Directive to become operational in law within the domestic legal order of Member State. Nevertheless, in appropriate conditions, a Directive may be directly effective in the sense that individuals may be able to seek judicial enforcement of rights and obligations derived from them.

Despite the difference in terminology between the terms “direct applicability” and “direct effect”, quite often, references to the European Court by national courts contain questions which misleadingly suggest the two terms to be one and the same. For example, in *Pubblico Ministero v Tullio Ratti*¹⁸⁶ the first question asked was whether “**Council Directive 73/173/EEC of 4 June 1973, in particular Article 8 thereof, constitute(s) directly applicable**”¹⁸⁷ legislation conferring upon individuals personal rights which the national courts must protect?” Similar questions were referred to the European Court in *Yvonne van Duyn v Home Office*¹⁸⁸, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*¹⁸⁹ and *Marleasing SA v La Comercial Internacional de Alimentacion SA*.¹⁹⁰ In all of these cases, the European Court seemed to deal with the questions without a clear statement that the terms were essentially different in meaning.

In *Yvonne van Duyn v Home Office*¹⁹¹, the European Court established for the first time that Directives, although not directly applicable in the sense of Regulations being directly applicable under Article 189 of the Treaty, may, in certain circumstances, have direct effect within the domestic legal order of Member States such that individuals could apply to national courts to have rights accruing from, and obligations imposed by, a Directive, to be

¹⁸⁶ Case 148/78

¹⁸⁷ Bold type supplied for emphasis.

¹⁸⁸ Case 41/74

¹⁸⁹ Case 14/83

¹⁹⁰ Case C-106/89

¹⁹¹ Case 41/74

enforced. The United Kingdom had argued that since Article 189 of the Treaty differentiated between Regulations and Directives and ascribed different legal effects to each, a Directive could not have the same effect as a Regulation so as to confer on individuals, rights which they can enforce in national courts. In answer to this argument, the European Court stated:

“If, however, by virtue of the provisions of Article 189 Regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that Article can never have similar effects. It would be incompatible with the binding effect attributed to a Directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by Directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law. Article 177, which empowers national courts to refer to the court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts.”¹⁹²

As can be seen, two specific reasons underlined the decision of the European Court in holding that a Directive may also have the capacity to be directly effective in the way Regulations generally are. The first is the idea that since a Directive is binding as to the result to be achieved, denying it direct effect as a matter of principle would negate the binding nature of Directives. The second reason is what one might call the Article 177¹⁹³ argument. Article 177 empowered national courts to refer questions “on the validity and interpretation of acts of the institutions of the Community” to the European Court for a preliminary ruling. The European Court felt that since this power related to all acts of the Community institutions without distinction, the implication must be that all of them, including Directives, may be invoked by in the national courts.

¹⁹² Ibid.

¹⁹³ Now Article 234

The latter reason is, with respect, somewhat weak. It is difficult to accept that the mere fact that legal questions concerning a Directive can be referred to the European Court by itself implies that Directives may be directly effective. Reliance on the wording of Article 177 to buttress the argument that Directives may by implication be directly effective is unhelpful because the general reference to acts of the Community institutions in Article 177 would necessarily include recommendations and opinions which have no binding effect whatsoever.

The European Court restated the principle that Directives may have direct effect in a number of subsequent cases.¹⁹⁴ In the *Ratti* case¹⁹⁵, the Court added a third reason for its decision. This was that in view of the binding nature of a Directive, at least as to its result, a Member State subject to the Directive is estopped, as against individuals deriving rights from the Directive, from relying on its own failure to perform the obligations imposed by the Directive.¹⁹⁶ Thus, national courts are under an obligation to uphold the provisions of a Directive against any incompatible national law of a defaulting Member State if called upon to do so by individuals deriving rights therefrom.

However, before a Directive can be enforced against a defaulting Member State by its national court, two conditions stipulated by the European Court in *Ratti's* case must be met. The first is that the obligation contained in the Directive must be “unconditional and sufficiently precise.”¹⁹⁷ This must mean that the result to be achieved by the Directive is clear and unequivocal, and the obligation to achieve the stated result itself is unconditional even

¹⁹⁴ See *Pubblico Ministero v Tullio Ratti*, Case 148/78; *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, Case 152/84; *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, Case 14/83 and *Marleasing v La Comercial Internacional de Alimentacion SA*, Case 106/89.

¹⁹⁵ *Supra*, note 186

¹⁹⁶ See paragraph 22 of the judgment.

¹⁹⁷ See paragraph 23 of the judgement.

though the choice and forms of methods to achieve the result may be open to the discretionary judgment of a Member States.

Secondly, the period allowed the Member State to implement the Directive must have expired before the obligation contained in it can become directly effective so as to confer rights on individuals which they could enforce in the national court of the defaulting Member State.¹⁹⁸

A Directive that has been adjudged to have direct effect must be upheld against all incompatible national law, whether made before or after the Directive. For national law made before the Directive, the Member State has an obligation to adapt it in compliance with the demands of the Directive. And for national law made in implementation of the Directive, the Member State has an obligation to ensure that the Directive is fully, effectively and correctly implemented. Any national law that is significantly different from the Directive, either because it is more restrictive, disadvantageous or otherwise must give way to the Directive.¹⁹⁹

The principle of direct effect of Directives enunciated in *van Duyn* and *Ratti* were somewhat watered down in *Marshall's case*²⁰⁰ when the European Court held that a Directive may have vertical direct effect only, and is incapable of having horizontal direct effect. Vertical direct effect refers to the notion that individuals can apply to national courts to enforce the provisions of a Community measure, for example, a Directive, against a Member State or its organs. On the other hand, horizontal direct effect refers to the capacity of an individual to apply in national courts to enforce rights derived from Community law not only against the State or emanations of the State, but also against other individuals. The reason underlying the

¹⁹⁸ See paragraph 43 of the judgment.

¹⁹⁹ See paragraph 25-27 of the judgment.

²⁰⁰ Supra, note 194.

decision of the Court was based on a textual reading of Article 189.²⁰¹ Under that Article, a Directive is stated to be binding upon the Member States to which it is addressed. The implication seemed to be that obligations arising from a Directive can only be enforced against Member States to whom it has been addressed, and not to individuals who have no direct obligation to implement the Directive.

However reasonable the Court's decision appears to be, seen in the light of the wording of Article 189, there was little doubt that one of the cardinal reasons for affording direct effect to Directives, which was to ensure the effectiveness of the binding nature of Directives, had been adversely affected. The decision meant that in proceedings between individuals, no one could rely on the provisions of a Directive even though those provisions may be relevant to the dispute between the parties, and one party may indeed be entitled to rights derived from the Directive in question. This obvious shortcoming apparently led to the development of the doctrine of *indirect effect* of Directives, or perhaps more appropriately, *indirect direct effect* of Directives.

Indirect direct effect of Directives seemed to have originated from the *von Colson case*²⁰². In the case, the European Court held that the obligation under the Treaty,²⁰³ to ensure that Directives are fully and effectively implemented or observed extends to all State authorities, including the national courts in matters within their jurisdiction. Thus, even in cases between individuals, national courts are under an obligation to interpret and apply national law adopted in implementation of a Directive in a manner that ensures the effectiveness of the objectives of the Directive concerned.²⁰⁴ The result is that in a case coming within the scope

²⁰¹ Now Article 249.

²⁰² Supra, note 194.

²⁰³ See in Particular, Article 5 (now Article 10)

²⁰⁴ See paragraph 26 of the judgment.

of a Directive, any apparently inconsistent national law must be construed in a manner that complies with the purpose of the Directive. In this way, national courts can be seen to give horizontal direct effect to Directives, albeit in an indirect manner.

It is worth pointing out that in *von Colson*, the European Court seemed to restrict the obligation on the national courts to interpret national legislation in the light of the purpose of the Directive concerned only to national law made specifically to implement the Directive in question. However, in *Marleasing*, the Court extended this interpretative obligation on national courts to all national law, whether made before or after the Directive concerned.

The interpretative obligation relating to the indirect direct effect of Directives as between individuals, formulated by the European Court in *von Colson* and *Marleasing* requires national courts to go **as far as possible**²⁰⁵ to interpret national law in conformity with the purpose of the Directive. This suggests that there may be instances where a national court, in seeking to enforce the Directive horizontally, may not be able to interpret national law in conformity with the Directive concerned, perhaps because it is linguistically impossible to interpret it consistently with the Directive. This is in contrast to the Court's approach when dealing with a Community measure that has vertical direct effect. In such cases, the European Court's approach is that domestic courts must, as a matter of principle, enforce the Community right involved irrespective of any inconsistent domestic legislation, however framed.

However, having regard to the obligation on national courts, as mentioned earlier, to ensure the effectiveness of a binding Directive, it is difficult to envisage a situation where a national court can validly ignore relevant provisions of the Directive solely on grounds of inability to

²⁰⁵ See *Marleasing*, at paragraph 8 of the judgment.

interpret national law in a manner consistent with the Directive. It is submitted therefore, that in spite of the seeming limit the interpretative obligation which the phrase, “so far as possible” suggests, there should in practice be no such limit on the ability of a national court seeking to achieve indirect direct effect of a Directive, to interpret national law consistently with the objective of the Directive concerned. As will be shown later in this chapter, the courts in the United Kingdom do not feel themselves limited by linguistic considerations in their capacity to interpret domestic legislation consistently with relevant Directives in cases arising between individuals.

As mentioned earlier, and as will be seen later in this chapter, the way in which United Kingdom courts exercise their interpretative powers under section 2(1) and (4) of the 1972 Act depends in large measure on whether the Community measure involved is one that is directly applicable in the sense of it having, by its very nature, automatic direct effect, or on whether the Community measure is a Directive capable of having direct effect. In the former case, the courts simply *disapply* any conflicting national law by use of what may be termed the *without prejudice rule of construction* whereby a proviso is implied into every national law that it is to apply without prejudice to rights accruing to individuals by virtue of directly applicable Community law.. In the latter case, in order to ensure the effectiveness of Directives, United Kingdom courts feel able to judicially modify even clear and unequivocal provisions in national law if that were necessary to ensure compliance with the purpose of the Directive concerned. This is so whenever a case comes within the scope of a Directive adjudged to have direct effect. Thus, in the United Kingdom, the difference between vertical direct effect, and horizontal direct effect, of Directives, appears quite blurred because the courts use the doctrine of indirect direct effect to its full extent such that all Directives could

in practice be relied on by individuals not only against the State and its emanations, but also against other individuals.

The *van Gend* case judicially established the principle of direct effect of directly applicable Community law. The relevant issue that arose for the determination of the European Court was whether Article 12 of the EEC Treaty had direct application within the territory of a Member State such that individual nationals of the State could rely on the provisions of the Article and indeed lay claim to individual rights accruing from them which the national courts must protect. In other words, would it be possible for a Treaty provision to give rise to an enforceable legal right within the domestic legal system without domestic legislative action?

The Court held:

“The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. **Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.**”²⁰⁶

The effect of the above statement is that Community law adjudged to be directly applicable can indeed be enforced in the domestic courts of a Member State in legal proceedings between individuals. This is what is meant by direct effect.

The *van Gend* case also established the principle of the supremacy or primacy of directly effective Community law over the national law of member States. The Court made it clear

²⁰⁶ Case 26/62. Judgment delivered 5 February 1963. Bold type supplied for emphasis.

that the very nature of the Community, and in particular, the provisions of Article 177 of the Rome Treaty made it inevitable that Community law be interpreted in a uniform manner throughout the territories of the Member States. This meant that national laws were not to be allowed to affect the validity or enforceability of directly effective Community law.

The Court pointed out that it was the duty of the national courts to ensure the protection of enforceable rights accruing from Community law. What this entailed in effect was that the national courts were to place directly effective Community legislation over and above national laws whenever there was a conflict between the two.

The resultant effect of all the above is that in the sphere of authority of the institutions of the Community, national legislatures have no power to legislate contrary to directly effective Community law.

The principle of the supremacy of Community law over the national law of Member States was reaffirmed by the European Court in the case of *Flaminio Costa v E.N.E.L.*²⁰⁷ The Court stressed that membership of the Community entailed a permanent surrender of sovereign rights by the Member States in the areas of authority of the Community. The very nature of the Community and its objectives inevitably call for uniformity of application of its laws in the territories of each and every Member State. It is inconceivable therefore, to allow Member States to be able to determine what Community legislation they would apply and what they would discard. Since the entire structure of the Community was based on mutual reciprocity, individual Member States could not be allowed to pick and choose which Community legislation they would apply within their national legal system. That would be the effect if national laws were to take precedence over directly effective Community law.

²⁰⁷ Case 6/64, judgment delivered on 15 July 1964.

Directly effective Community legislation trumps not only existing national law, but also any national law enacted subsequently.

Lastly, in *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle fur Getreide und Furttermittel*²⁰⁸ the European Court had to decide the question whether provisions of Community law that were found to be inconsistent with the German Constitution must yield to the Constitution. In other words, could the validity of Community law be determined by reference to national constitutional measures?

In a ruling that further affirmed the supremacy of Community law over national law, the European Court held that directly effective Community law took precedence even over national constitutional provisions. According to the Court,

“...the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.”²⁰⁹

The three European cases mentioned above have shown that, from the point of view of the European Court, the supremacy of directly effective Community legislation is total. Directly effective Community law takes precedence over all forms of national law, whether constitutional or otherwise. It takes precedence over existing as well as subsequent national enactments.

²⁰⁸ Case 11/70. Judgment delivered 17 December 1970.

²⁰⁹ Ibid.

Membership of the Community therefore entailed an acceptance of these vital Community principles.

No doubt, there were constitutional hurdles to be overcome if the principles above mentioned were to be received within the existing constitutional framework of the United Kingdom. First, direct applicability meant that law-making powers (albeit limited) had to be surrendered to Community institutions. And because directly applicable Community legislation applies independently of national legislative enactments, it meant that Parliament would have virtually no direct role to play in their making. The problem was even more pronounced in relation to directly applicable Community legislation to be enacted from time to time in the future (i.e. subsequent to the United Kingdom formally joining the Community). No prior parliamentary approval would be required for them to take effect as law within the domestic legal regime.

Secondly, as has been shown above, the principle of the supremacy of directly effective Community law meant that inconsistent Acts of Parliament (whenever enacted) must give way to directly effective Community legislation.

Section 2(1) of the 1972 Act set out above was apparently enacted to enable directly applicable Community legislation to be recognised in law and enforced by United Kingdom courts without further parliamentary enactment. And section 2(4) of the same Act gave effect to the European principle of the supremacy of directly effective Community law in that it directed the domestic courts to construe all parliamentary enactments, already past or to be past in the future, subject to the terms of directly effective Community law. Thus, section

2(1) and (4) of the 1972 Act received the principles of direct applicability, direct effect and supremacy of Community law into United Kingdom legal system.

These principles together challenge the traditional concept of parliamentary sovereignty. According to this concept,

“Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts. The same principle, looked at from its negative side, may be thus stated: There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the courts in contravention of an Act of Parliament.”²¹⁰

There appeared to be two competing sovereignties at play – that of directly effective Community law on the one hand, and the sovereignty of the Parliament of the United Kingdom on the other hand. The traditional account of parliamentary sovereignty implies that parliamentary supremacy is “continuing” and therefore cannot be surrendered even by Parliament itself. The courts are therefore duty-bound to give effect to the latest will of Parliament as expressed in an Act of Parliament. This is necessary in order that the law-making powers of future Parliaments are not fettered.²¹¹

As evidenced by the cases of *Vauxhall Estates Ltd v Liverpool Corporation*²¹² and *Ellen Street Estates Ltd v Minister of Health*²¹³, it is ordinarily impossible for one Parliament to restrict the law-making authority of its successor Parliaments.²¹⁴ Both cases, it should be recalled, concerned a provision of the Acquisition of Land (Assessment of Compensation)

²¹⁰ Dicey, op. cit, supra, note 1, at p. 40.

²¹¹ See Wade, H. W. R. (1955). "The Basis of Legal Sovereignty." Cambridge Law Journal: 177-197, at p. 176.

²¹² (1931-32), Vol. XLVIII, The Times Law Report 100; [1932] 1 KB 733

²¹³ [1934] All ER 385, [1934] 1 KB 590

²¹⁴ See discussion in chapter 2 above.

Act 1919, which stipulated that the provisions of any other Act of Parliament dealing with the subject of land acquisition “shall cease to have or shall not have effect” if inconsistent with the 1919 Act. It was argued that the above provision had the effect of nullifying inconsistent provisions appearing in a subsequent Act, the Housing Act 1925. The courts rejected this argument. In *Vauxhall*, Avory J. observed that such an argument was contrary to the “principle of the constitution” and declared, “no Act of Parliament can effectively provide that no future Act shall interfere with its provisions.”²¹⁵ And in the *Ellen Street* case, Maugham L.J. made it clear that a subsequent Act of Parliament could always alter the terms of a previous Act by way of implied repeal, notwithstanding any parliamentary attempt to prevent this.²¹⁶

In view of the traditional concept of parliamentary sovereignty, the biggest problem would be how to reconcile the European principle of the supremacy of directly effective Community law with the apparently irreconcilable British constitutional doctrine of parliamentary sovereignty. In other words, when faced with an Act of Parliament found to be irreconcilably inconsistent with the terms of a directly effective Community legislation, which of the two would the courts accept as prevailing over the other?

The Government and Parliament were not unaware of the problem of competing sovereignties posed by the reception of the principles of direct applicability and supremacy of directly effective Community law at the time the 1972 Act was passed. Indeed, at the second reading of the European Communities Bill in the House of Lords, referring specifically to the reception of the concept of direct applicability, the Lord Chancellor²¹⁷ acknowledged that it was a “novel conception”, but declared that it was “an inescapable condition of membership.”

²¹⁵ [1932] 1 KB 733 at 743

²¹⁶ [1934] 1 KB 590 at 597

²¹⁷ Hansard (HL) of 25 July 1972, Column 1228

The Lord Chancellor also acknowledged the potential conflict between what he called “the new source of law provided by the Treaty and regulations” on the one hand, and “the doctrine of the sovereignty of Parliament and its corollary (I believe judge-made) the doctrine of the priority of later Acts over previous Acts; the rule of construction whereby when two Acts conflict the later is construed as amending or repealing the earlier one.”²¹⁸

However, in spite of the potential tension between the two competing sovereignties, section 2(4) of the 1972 Act did not frontally confront the issue.²¹⁹ It did not state categorically and unequivocally that directly effective Community law must take priority at all times over national law in the way that the provisions of a rigid, written constitution supersede ordinary legislative enactments. On the other hand, it also did not make it categorically and unequivocally clear that the sovereignty of Parliament remained unaffected. This was in spite of a proposal for an amendment of the terms of what became section 2 of the Act, in form of the following proviso aimed at making it abundantly clear that an Act of Parliament would always prevail over inconsistent Community legislation: “Provided that nothing in this Act shall be held to detract from the ultimate sovereignty or supremacy of Parliament or to prejudice the right of Parliament to repeal it or alter its provisions.”²²⁰

Section 2(4) was drafted in conveniently fluid terms, merely directing the courts to construe all legislation, past as well as future, subject to the terms of directly effective Community law. The fluidity of the provisions receiving the principles of direct applicability and supremacy of directly effective Community law is understandable given the political circumstances in which the Government found itself. It had two apparently conflicting interests to satisfy. On the one hand, as pointed out by the Lord Chancellor, acceptance of

²¹⁸ Ibid, Column 1230

²¹⁹ See Elliott, M. (2004). "United Kingdom: Parliamentary Sovereignty Under Pressure." International Journal of Constitutional Law **ICoN 2.3 (545)**(July): 545.

²²⁰ Amendment No. 28 moved by Lord Beswick. See Hansard (HL) of 07 August 1972, Column 893.

these principles was “an inescapable condition of membership.” On the other hand, the Government had to give sufficient assurances to Parliamentarians that parliamentary authority was not eroded, if it were to successfully get the Bill passed into law. An appropriate balance had to be found between the need not to upset the Community institutions even before the country became a full member of the Community, and the desire at the same time to reduce likely Parliamentary opposition over concerns pertaining to the doctrine of parliamentary sovereignty.

The result was that both interests appear to have been satisfied in a somewhat inexplicable way. And in some way, it was as if Parliament was passing the buck to the courts to determine the proper relationship between directly effective Community legislation and the traditional concept of the sovereignty of the Parliament of the United Kingdom. How have the courts approached the challenge? How have they exercised their interpretative power under section 2(4) in particular? These questions will be examined in the next section.

III. Judicial Approaches to Statutory Interpretation Under Section 2(1) and (4)

The early cases indicated that the provisions of section 2(1), which dealt with directly effective Community law, posed little problem for the courts. The courts seemed to understand that by that subsection, directly effective Community law was to have the force of law domestically and be so applied in the courts of law.

Thus, in *Bulmer v Bollinger*²²¹, an appeal from the decision of the High Court refusing to refer certain questions to the European Court under Article 177 of the EEC Treaty, Lord Denning, Master of the Rolls, made reference to section 2(1) of the 1972 Act, and said:

“The statute is expressed in forthright terms which are absolute and all-embracing. Any rights or obligations created by the treaty are to be given legal effect in England without more ado. Any remedies or procedures provided by the treaty are to be made available here without being open to question. In future, in transactions which cross the frontiers, we must no longer speak or think of English law as something on its own. We must speak and think of Community law, of Community rights and obligations, and we must give effect to them.”²²²

The issue that appeared to be more problematic for the courts was the issue of the supremacy of directly effective Community law as embodied in section 2(4) of the Act. The early cases revealed the rather dithering manner in which the judges dealt with the supremacy of directly effective Community law in relation to an Act of the Parliament of the United Kingdom. They contain dicta suggesting both an inclination towards upholding the European view-point on the issue of the supremacy of directly effective Community law, as well a desire to preserve the status of an Act of Parliament as the highest form of law within the United Kingdom.

In one of the earliest cases that went before the courts, *Graham, J* duly acknowledged that the 1972 Act accorded priority to directly effective Community law over the domestic law of the United Kingdom when he stated, “This Act ... to put it very shortly, enacted that relevant Common Market law should be applied in this country and should, where there is a conflict, override English law.”²²³

²²¹ [1974] 2 All ER 1226.

²²² Ibid.

²²³ *Aero Zipp Fasteners v Y.K.K. Fasteners (UK) Ltd* [1973] CMLR 819.

But in *Bulmer v Bollinger*²²⁴ Lord Denning asserted that the Treaty was “equal in force to any statute.” What did he mean? Is it the case that Treaty provisions, including those having direct effect, were to be treated as being of equal status with an Act of Parliament? If this was what Lord Denning meant, then the position would be that in case of a conflict between a provision of Community law having direct effect on the one hand, and an Act of Parliament on the other hand, the conflict would be resolved not by an application of the European principle of the supremacy of directly effective Community law, but by the ordinary common law interpretative principle of implied repeal whereby inconsistent provisions in an earlier statute are impliedly repealed by a later statute.

Lord Denning’s dictum in *Felixtowe Dock & Ry Co. v British Transport Docks Board*,²²⁵ appeared to confirm the above interpretation of his statement in *Bulmer v Bollinger*,²²⁶ that Community law was in no way superior to an Act of Parliament.

In the *Felixtowe* case, the British Transport Docks Board had entered into an agreement with the Plaintiff Company to buy all of its shares and subsequently take over the company. The agreement was subject to the approval of Parliament which approval was to be by way of an Act of Parliament. This was because the Board was a statutory body and lacked the capacity to undertake the proposed venture without an enabling Act of Parliament.

While Parliament was in the process of enacting the necessary legislation for the purpose of enabling the Board to buy and take over the Company, the Company took out proceedings challenging the validity (or the continued validity) of the agreement. One of the grounds of

²²⁴ Op. cit., supra, note 189.

²²⁵ [1976] 2 CMLR 655.

²²⁶ Supra, note 189.

challenge was that the take over would amount to the Board abusing a dominant market position contrary to Article 86 of the Treaty of Rome.

Article 86 provided that “Any abuse by any one or more undertakings of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market in so far as it may affect trade between member-States.”

Following the European Court case of *van Gend*,²²⁷ there was no doubt that Article 86 of the Treaty had direct applicability. It was of a clearly prohibitive nature and the prohibition contained in it was not dependent for its enforceability, on a domestic legislative measure. Consequently, the provision in Article 86 had direct effect in the United Kingdom

The Court of Appeal, like the court below it, ruled that the take over would not amount to an abuse of dominant position by the Board. However, the statement, made obiter by Lord Denning, on the potential relationship between Article 86 of the Treaty and a subsequent Act of Parliament, is relevant. On this point, Lord Denning said, “It seems to me that once the Bill is passed by Parliament and becomes a Statute, that will dispose of all this discussion about the Treaty. These courts will then have to abide by the Statute without regard to the Treaty at all.”²²⁸

The implication of this is that if Parliament had passed the Act authorising the take over of the Plaintiff Company by the Board, it would become immaterial whether the take over put the Board in an abusive position contrary to Article 86 of the Treaty.

²²⁷ Case 26/62

²²⁸ [1976] 2 CMLR 655, at p. 664-665, paragraph 32 of the judgment.

If this were the case, it would seem that section 2(4) of the 1972 Act had brought little or no change to the way in which the courts interpret primary legislation. It would mean that directly effective Community law has no superior force over an Act of Parliament. The status quo would remain unchanged.

Yet, the language of section 2(1) and (4) of the 1972 Act seems to indicate that directly effective Community law is to be accorded priority over the domestic law of the United Kingdom, including an Act of Parliament. The provisions in section 2(1) and (4) above are further strengthened by the provision in section 3(1), which provides as follows:

“For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning and effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by any relevant decision of the European Court.)”

Thus, the combined provisions of section 2(1) and (4) and section 3(1) of the 1972 Act indicate not only that the courts of the United Kingdom are to give legal effect to directly effective Community law, but are statutorily obliged to ensure that their decisions are not contrary to the jurisprudence of the European Court on matters of Community law.

However, more dicta on this crucial European principle of the supremacy of directly effective Community law were still to come from Lord Denning. These later dicta illustrate the relative uncertainty with which the judiciary initially approached the interpretative obligation contained in section 2(4) of the 1972 Act in the early days of the Act.

In *Shields v E Coomes (Holdings) Ltd*,²²⁹ Lord Denning acknowledged the principle of the supremacy of directly effective Community law. He expressed the opinion that directly effective Community law should prevail over inconsistent provisions of an Act of Parliament.

For example, after referring to Article 119 as having direct effect, he said:

“Suppose that the Parliament of the United Kingdom were to pass a statute inconsistent with art 119: as, for instance, if the Equal Pay Act 1970 gave the right to equal pay only to unmarried women. I should have thought that a married woman could bring an action in the High Court to enforce the right to equal pay given to her by art 119.”²³⁰

Going by the above dictum, by virtue of the 1972 Act, United Kingdom courts have the duty to apply directly effective Community law and to enforce them even in the face of an inconsistent Act of Parliament. This would mean that in the hierarchy of laws in the United Kingdom, directly effective Community law would be placed on a higher level than an Act of Parliament.

Again, in *Macarthy Ltd v Smith*,²³¹ Lord Denning reiterated the view that section 2(1) and (4) of the 1972 Act had the effect of conferring priority on directly effective Community law over Acts of the United Kingdom Parliament. Accordingly, domestic legislation must be interpreted bearing in mind the “overriding force” of directly effective Community law.²³²

However, it should be mentioned that the force of his Lordship’s statement in *Macarthy* on the superiority of Community law was considerably watered down when he appeared to limit the application of the principle to instances where the inconsistency was occasioned “by

²²⁹ [1978] 1 WLR 1408; [1979] 1 All ER 456

²³⁰ Ibid.

²³¹ [1979] 3 All ER 325; [1979] 1 WLR 1189

²³² Ibid, per Lord Denning.

some oversight”²³³ of the draftsman. What is the position, for example, where Parliament enacted legislation that is unambiguously inconsistent and this was not occasioned by any “oversight” on the part of the draftsman?

Perhaps, it was not until the case of *Pickstone v Freemans*²³⁴ that clear judicial approaches to the interpretation of legislation pursuant to the interpretative obligation contained in section 2(4) of the 1972 Act began to emerge. The courts began at that stage to develop clear-cut principles of statutory interpretation in relation to the interpretative duty under section 2(1) and (4) of the 1972 Act.

The tension between the principle of the supremacy of directly effective Community legislation as received through section 2(4) of the 1972 Act on the one hand, and the traditional concept of parliamentary sovereignty on the other hand, was brought into sharp focus in the *Factortame* series of cases.

In *Factortame Ltd & Others v Secretary of State for Transport*²³⁵ (No.1 in the House of Lords) Part II of the Merchant Shipping Act 1988, and in particular, section 14²³⁶ had laid down new conditions for the registration of fishing vessels in Britain. Section 14(1) provided that

“... a fishing vessel shall only be eligible to be registered as a British vessel if – (a) the vessel is British-owned; (b) the vessel is managed, and its operations are directed

²³³ Ibid.

²³⁴ [1989] AC 66. This case is discussed below.

²³⁵ [1990] 2 AC 85

²³⁶ Since repealed by Merchant Shipping (Registration, etc.) Act 1993

and controlled, from within the United Kingdom; and (c) any charterer, manager or operator of the vessel is a qualified person or company.”

By section 14(2), a fishing vessel is to be regarded as British-owned only if it is owned by a British citizen or by a British company in accordance with the provisions of section 14(7).

The applicants were companies incorporated in the United Kingdom, with directors and shareholders most of whom were Spanish nationals. Together, they owned a substantial number of fishing vessels operating as British fishing vessels under the Merchant Shipping Act 1894. The clear and unambiguous provisions of the new Act of 1988 had the effect of disqualifying them from having their fishing vessels registered, mainly because they were not British nationals or British companies in accordance with the provisions of Part II of the 1988 Act.

Being Community nationals, the applicants took out proceedings in the Divisional Court, arguing that the provisions of Part II of the 1988 Act violated certain directly effective Community rights to which they were entitled. These included amongst others, the right not to be discriminated against on grounds of nationality as guaranteed by Article 7, and the right to free movement of persons, services and capital, as well as freedom of establishment, all guaranteed by the Treaty of Rome.

It was common ground that the relevant provisions of the 1988 Act were clear and unambiguous and that their effect would be to deny the applicants registration of their fishing vessels as British fishing vessels. The substantive issue in the case before the Divisional Court was whether the provisions indeed violated directly effective Community rights to which the applicants were entitled. While the applicants contended that they did, the

Secretary of State contended that they did not. The Divisional Court decided to refer the point to the European Court²³⁷ for a preliminary ruling pursuant to Article 177 of the Treaty.

Meanwhile, the applicants applied for an interim order suspending the operation of Part II of the 1988 Act and restraining the Secretary of State from applying or enforcing the relevant provisions against the applicants and their vessels pending the determination of the substantive issue.

The Divisional Court granted the order and suspended the relevant provisions accordingly. On appeal, the Court of Appeal discharged the interim order. On appeal to the House of Lords by the applicants, the House held that under English law, no court had the power to suspend, or in any way *disapply* the provisions of an Act of Parliament pending the resolution of a matter in court. In the words of Lord Bridge, who delivered the lead ruling of the House,

“... An order granting the applicants the interim relief which they seek will only serve their purpose if it declares that which Parliament has enacted to be the law from 1 December 1988, and to take effect in relation to vessels previously registered under the Act of 1894 from 31 March 1989, not to be the law until some uncertain future date. Effective relief can only be given if it requires the Secretary of State to treat the applicants’ vessels as entitled to registration under Part II of the Act in direct contravention of its provisions. Any such order, unlike any form of order for interim relief known to the law, would irreversibly determine in the applicants’ favour for a period of some two years rights which are necessarily uncertain until the preliminary ruling of the E.C.J. has been given. If the applicants fail to establish the rights they claim before the E.C.J., the effect of the interim relief granted would be to have conferred upon them rights directly contrary to Parliament’s sovereign will and correspondingly to have deprived British fishing vessels, as defined by Parliament, of the enjoyment of a substantial proportion of the United Kingdom quota of stocks of fish protected by the common fisheries policy. I am clearly of the opinion that, as a matter of English law, the court has no power to make an order which has these consequences.”²³⁸

²³⁷ See *Regina v Secretary of State for Transport, Ex parte Factortame Ltd & Others*, Case C 221/89 (ECJ) (*Factortame II*), judgment delivered 25 July 1991.

²³⁸ [1990] 2 AC 85. Apparently, the decision to refuse to suspend the operation of the 1988 Act pending the resolution of the issue as to whether it was incompatible with the applicants’ directly effective Community

The nature of the application of the applicants also made it impossible for the House of Lords to grant interim relief. The applicants' had asked that the Secretary of State be restrained from enforcing the 1988 Act in respect of them and any vessels owned by them, pending the resolution of the substantive case. Their Lordships ruled that prior to the enactment of the Crown Proceedings Act 1947, injunctions could not be issued against the Crown and officers of the Crown. It held that the combined effect of section 21(2) and 23(2)(b) of the Crown Proceedings Act 1947 preserved the pre-1947 position. Section 21(2) provided as follows:

“The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.”

Section 23(2)(b) defined “civil proceedings” as used in section 21(2) set out above, as “proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by an action against the Attorney General, any Government department, or any officer of the Crown as such;....” Their Lordships clearly saw the instant proceedings as coming within the purview of section 23(2)(b). Thus, they felt powerless to grant the interim injunction sought by the applicants.²³⁹

rights was based on the principle that the Act must be presumed valid until determined invalid in accordance with Community law principles.

²³⁹ Professor H.W.R. Wade heavily criticised the House of Lords for holding that they were powerless to grant an interim injunction against a minister of the Crown. He contended that prior to the Crown Proceedings Act 1947, immunity from injunctive orders was available only to the Crown itself, and to Crown Officers in their representative capacity (as representing the Crown). He argued that officers of the Crown acting in their own official capacity, or exercising their own statutory powers, had no immunity from injunctive orders. Thus, an injunction (interim or otherwise) could be granted in respect of their acts, or threatened acts. See Wade, H. W. R. (1991). "Injunctive relief against the Crown and Ministers." Law Quarterly Review **107**(January): 4 -10.

However, their Lordships decided, pursuant to Article 177 of the Treaty, to refer to the European Court the question whether, irrespective of the position under national law, Community law empowered or obliged an English court to suspend national legislation on an interim basis if this were necessary to protect putative rights claimed under directly effective Community law.²⁴⁰

In *Regina v Secretary of State for Transport, Ex parte Factortame Ltd & Others*,²⁴¹ (*Factortame I*) the European Court answered the above question in the affirmative. It ruled: “Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.”²⁴²

Upon receipt of the ruling of the European Court above mentioned, the House of Lords in *Factortame v Secretary of State for Transport (No2)*,²⁴³ granted the interim order, in effect suspending on an interim basis, pending the resolution of the substantive claims of the applicants under Community law, the operation or enforcement of Part II of the 1988 Act so far as it affected the applicants.

²⁴⁰ According to Joanna Goyder, “by submitting a preliminary question to the European Court on what is essentially a question of constitutional law, the House of Lords is deferring to the EEC institutions on the matter of the extent to which national sovereignty is curtailed by European law.” See Goyder, J. (1989). “Interim relief - no power to grant interim injunction in judicial review proceedings against the Crown.” Journal of International Banking Law 4(4): N159 - 161.

²⁴¹ Case C 213/89 (ECJ), judgment delivered on 19 June 1990.

²⁴² Ibid.

²⁴³ [1991] 1 All ER 70, [1990] 3 WLR 818

Meanwhile, the Divisional Court's reference to the European Court, concerning the substantive issue, (i.e. whether the relevant provisions of the Merchant Shipping Act 1988 violated directly effective Community law), was determined by the European Court in Case 221/89 (*Factortame II*). The Court held in essence, that the stipulated conditions for registration under the 1988 Act, concerning nationality and residency, violated directly effective Community law, in particular, Article 52 of the E.E.C. Treaty, as far as Community nationals were concerned. Following this ruling, the Divisional Court made consequential declarations in the substantive case, to the effect that the relevant provisions of the 1988 Act violated the applicants' directly effective Community rights.

Later, the European Court further decided in *Factortame III*²⁴⁴ that, where a national legislature breaches an individual's directly effective Community right, such an individual would be entitled to claim remedies for loss or injury suffered if "the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individual(s)."²⁴⁵

Following the above decision, the Divisional Court²⁴⁶ held, amongst others, that the United Kingdom's breaches of Community law occasioned by the enactment of Part II of the Merchant Shipping Act of 1988 "were sufficiently serious to give rise to liability for any damage that may subsequently be shown to have been caused to the applicants."²⁴⁷ This decision was upheld both by the Court of Appeal²⁴⁸ and the House of Lords²⁴⁹ (*Factortame*

²⁴⁴ *Brasserie du Pêcheur SA v Germany, R v Secretary of State for Transport, ex parte Factortame Ltd*, Joined case C-46/93 and C-48/93

²⁴⁵ *Ibid.*

²⁴⁶ *R v Secretary of State for Transport, ex parte Factortame & Others*, CO/1735/98 The Times 11 September 1997,

²⁴⁷ Per Hobhouse, LJ, who delivered the judgment of the Court whose panel included Collins and Moses, JJ

²⁴⁸ [1999] 2 All ER 640, [1998] 3 CMLR 192

²⁴⁹ [2000] 1 AC 524, [1999] 4 All ER 906, [1999] 3 WLR 1062

No.3). Their Lordships ruled that the owners of the fishing vessels whose registration was prevented by the deliberate enactment of Part II of the 1988 Act in clear breach of directly effective Community rights were entitled to claim compensation for any loss suffered as a result.

Although the main issue that was argued in the first *Factortame*²⁵⁰ case that went before the House of Lords was whether an interim order could be granted, suspending the operation of the provisions of the Merchant Shipping Act 1988 as it affected the applicants, pending the resolution of the substantive matter in the Divisional Court, the significance of the case as it concerns the interpretative obligation under section 2(4) of the 1972 Act should not be lost. In the first place, the reason the interim order issue was arguable at all was because the applicants had a strong point of law in section 2(4) in their argument in the substantive matter, that directly effective Community rights to which they were entitled had been violated by the 1988 Act. In other words, the application for interim relief was premised on directly effective Community rights accruing by virtue of section 2(1) and (4) of the 1972 Act. By section 2(4) these rights enjoy supremacy over the inconsistent provisions of the 1988 Act, thus rendering the relevant provisions of the 1988 Act invalid or unlawful, at least in the context of the 1972 Act. Indeed, it is apparent in the speech of Lord Goff in the second *Factortame*²⁵¹ case, that his Lordship was partly influenced in granting the interim relief sought by the applicants, by the considerable strength of their legal challenge to the validity of the 1988 Act as it affected them. In any case, since the House of Lords granted interim relief in the second *Factortame* case, in effect suspending the operation of the 1988 Act on the basis, amongst others, that it might be in violation of the directly effective Community rights of the applicants, it follows that their Lordships took it for granted that the Divisional

²⁵⁰ [1990] 2 AC 85

²⁵¹ [1991] 1 All ER 70

Court (or the House itself, if necessary) would be required to make a final order *disapplying* the 1988 Act if the applicants succeeded in their substantive claim.

The point made above is implicit in Lord Bridge's speech in the first *Factortame*²⁵² case, where he spelt out the interpretative approach to be adopted pursuant to the interpretative obligation under section 2(4) of the 1972 Act. His Lordship stated that

“By virtue of section 2(4) of the Act of 1972 Part II of the Act of 1988 is to be construed and take effect subject to directly enforceable Community rights and those rights are, by section 2(1) of the Act of 1972, to be ‘recognised and available in law, and... enforced, allowed and followed accordingly; ...’ This has precisely the same effect as if a section were incorporated in Part II of the Act of 1988 which in terms enacted that the provisions with respect to registration of British fishing vessels were to be **without prejudice**²⁵³ to the directly enforceable Community rights of nationals of any member state of the E.E.C.”²⁵⁴

Two things are notable about Lord Bridge's adoption of the “without prejudice” rule of construction of primary legislation touching on directly applicable Community legislation imbued with direct effect.. First, it has to be noted that in the *Factortame* cases, the meaning and effect of the relevant provisions of the 1988 Act were never in doubt. All parties were in agreement that the provisions were sufficiently clear and that they had the effect of preventing the applicants' fishing vessels from being registered as British vessels. The statutory words used clearly conveyed the parliamentary intention. There appeared to be no absurdity or inconsistency within the four walls of the statute, which would ordinarily warrant a search for alternative interpretations of the provisions. Further, adoption of a purposive approach²⁵⁵ to the interpretation of the provisions would only have confirmed the

²⁵² [1990] 2 AC 85

²⁵³ Bold type supplied for emphasis.

²⁵⁴ [1990] 2 AC 85

²⁵⁵ As discussed in chapter 3 above.

same parliamentary intention apparent in the statutory words used. In short, there appeared to be no doubts whatsoever as to the intention of Parliament in enacting the 1988 Act.

As has been shown earlier in this thesis,²⁵⁶ the primary judicial objective of statutory interpretation is the ascertainment of parliamentary intention. And the search for Parliament's intention is ordinarily governed by the words used in the enactment, construed in the context in which they have been used. Where the words are clear and unambiguous, and leads to no absurdity (as seems to be the case in the *Factortame* cases), they must be given their ordinary and natural meaning. In such a case, a judicial alteration of the relevant statutory provision under the guise of interpretation would seem to be unjustified. As has been shown earlier,²⁵⁷ courts are duty-bound to apply the intention of Parliament in fulfillment of the requirements of the concept of parliamentary sovereignty.

Thus, Lord Bridge's application of the "without prejudice" rule would seem to relegate parliamentary intention to the background. The consequence is that parliamentary intention plays a much less significant role in the interpretative process adopted under section 2(4) of the 1972 Act. The intention of Parliament in enacting the 1988 Act was given little or no weight at all.

The second thing to note about Lord Bridge's approach to the interpretative obligation under section 2(4) of the 1972 Act is that the "without prejudice" rule of construction apparently demanded therein is applicable both to Acts passed after the 1972 Act and to Acts passed before the 1972 Act. With regards to Acts of Parliament preceding the 1972 Act, little constitutional or interpretative difficulty seems to exist. Normally, the terms of the 1972 Act

²⁵⁶ See chapter 3.

²⁵⁷ See chapter 2.

would override inconsistent provisions of earlier Acts by application of the principle of implied repeal.²⁵⁸ However, with regards to Acts such as the 1988 Act, passed after the 1972 Act, application of the “without prejudice” rule of construction by authority of the 1972 Act would seem to make the 1972 Act prevail over inconsistent provisions of later Acts. This would have the result of breaching the constitutional principle that the courts must obey the latest will of Parliament, and the concomitant interpretative principle of implied repeal.

Unfortunately, the judges in the *Factortame* cases failed to deal specifically with the issues raised above. In fact, Mark Elliott has criticised their Lordships for the “paucity of discussion ... of the constitutional underpinnings and implications of their recognition of the primacy of EC law.”²⁵⁹ Allan has also made a similar criticism.²⁶⁰ However, these criticisms are somewhat unfair taking into consideration the nature of the issue argued before their Lordships. As has been noted above, the principal issue that arose for the determination of their Lordships, both in the first as well as in the second *Factortame* cases in the House, was the propriety of granting an interim injunction in the circumstances of the matter. The primacy of Community law was never an issue in both cases. As a matter of fact, both parties were in agreement that the 1972 Act accorded primacy to directly effective Community law. The issue was therefore not a subject for argument and was accordingly not argued by the parties. In these circumstances, their Lordships could hardly be expected to deal extensively

²⁵⁸ See *Ellen Street Estates Ltd v Minister of Health* [1934] All ER 385, [1934] 1 KB 590; *Vauxhall Estates Ltd v Liverpool Corporation* (1931-32), Vol. XLVIII, The Times Law Report 100; [1932] 1 KB 733.

²⁵⁹ Elliott, M. (2003). "Embracing 'Constitutional' Legislation: Towards Fundamental Law?" *N.I. Legal Quarterly* **54**: 25. See also
Elliott, M. (2004). "United Kingdom: Parliamentary Sovereignty Under Pressure." *International Journal of Constitutional Law* **ICoN 2.3 (545)**(July): 545.

²⁶⁰ See Allan, T. S. R. (1997). "Parliamentary Sovereignty: Law, Politics, and Revolution." *Law Quarterly Review* **113**(July): 443-452, at p. 448.

with the constitutional relationship between directly effective Community law and Acts of the United Kingdom Parliament.

Nevertheless, Mark Elliott was right in observing that there was a “paucity of discussions” of important constitutional issues in the *Factortame* cases. For instance, it is not clear from the speech of Lord Bridge quoted above, whether the “without prejudice” rule is to be perceived as some form of substantive rule of law whereby every Act of Parliament, irrespective of the strength of Parliamentary intention revealed in it, must be construed as giving way to directly applicable Community law in case of a clash between the two; or whether, on the other hand, it should be interpreted merely as a rule of construction enabling the court to give priority to directly effective Community law over inconsistent provisions in an Act of Parliament unless the Act contains a deliberate, express and specific provision unequivocally signifying Parliament’s intention to derogate from directly effective Community law, in which case the court would be obliged to obey and apply the Act and ignore the directly effective Community law.

The first interpretation above would seem to equate directly effective Community law with a written rigid constitution to which every Act must conform if it is not to be ignored or *disapplied* by the courts. This would include Acts containing express derogations from directly effective Community law. So far as the United Kingdom remained a member of the Community, the courts would enforce directly effective Community law irrespective of whatever Parliament enacts. This interpretation is more radical in nature than the second one, which sees the “without prejudice” rule in more modest terms. The second interpretation above would seem to emphasise the “without prejudice” rule as a formal requirement only, whereby Parliament is required to draft legislation intended to breach directly effective

Community law, in a manner that leaves no doubt whatsoever as to its intention. Not surprisingly therefore, the legal and constitutional implications of the “without prejudice” rule propounded by Lord Bridge have been the subject of academic debates and speculations. Professor H.W.R. Wade’s interpretation of the legal and constitutional implications of the *Factortame* cases, and in particular, of Lord Bridge’s approach to the interpretative obligation under section 2(4) of the 1972 Act is to be found in his article written in 1996.²⁶¹ His analysis is as follows.

Professor Wade began by observing that the effect of the second *Factortame* case in the House of Lords was that the House granted an injunction forbidding a minister from obeying the Merchant Shipping Act 1988, and in doing this, the House acted on the authority of the 1972 Act. This, he argued, violated the principle of implied repeal, the rule that the court must apply the terms of a later Act of Parliament in preference to conflicting provisions in an earlier Act. Wade asserted that the effect of the decision was that the “Parliament of 1972 had succeeded in binding the Parliament of 1988 and restricting its sovereignty, something that was supposed to be constitutionally impossible.” Sovereignty, he argued, belonged to the Parliament of the day. Accordingly, the present Parliament could not be regarded as sovereign if its legislative power was fettered by legislation enacted by a previous Parliament.²⁶²

Wade argued that Lord Bridge’s “without prejudice” rule of construction was more than an exercise in construction. Being based on the interpretative obligation contained in section 2(4) of the 1972 Act, it amounted to a restriction on the legislative power of the 1988

²⁶¹ Wade, H. W. R. (1996). "Sovereignty - Revolution or Evolution?" Ibid. **112**(October): 568-575.

²⁶² Ibid, p. 568

Parliament (imposed by the 1972 Parliament), thus infringing on the traditional doctrine of parliamentary sovereignty.

Wade conceded that in theory, Parliament could repeal the 1972 Act and renounce Britain's membership of the Community. He accepted that in such a situation, the courts would be bound to obey the Parliamentary enactment and refuse to apply Community law any further. However, Wade distinguished that kind of situation from the present case. He asserted, "While Britain remains in the Community we are in a regime in which Parliament has bound its successors successfully...."²⁶³ He characterised this as "a constitutional revolution" albeit a "technical" one.²⁶⁴ He perceived the 1972 Act as creating a "higher law" (i.e. directly effective Community law) to which all Acts of Parliament were subordinated "for as long as British membership continues."²⁶⁵

As apparent from Wade's analysis of the constitutional implications of the *Factortame* cases, his view of the interpretative obligation under section 2(4) (as revealed by *Factortame*) is that the provisions therein go beyond a mere exercise in construction. The provisions constitute a substantive restriction on parliamentary power, applying to all legislation, irrespective of the statutory language used. His "higher law" view of Community law in relation to Acts of the British Parliament would seem to indicate that British courts have chosen to transfer their allegiance to Community law, albeit in a limited scope. This was what Wade himself had argued would be constitutionally impossible except by means of a revolution.²⁶⁶ Thus, his characterisation of the decision in *Factortame* as a revolution may seem to be an attempt to align his argument here with that outlined in his 1955 article.

²⁶³ Ibid, p. 570-571

²⁶⁴ Ibid, p. 568, 571

²⁶⁵ Ibid, p. 571

²⁶⁶ Wade, H. W. R. (1955). "The Basis of Legal Sovereignty." Cambridge Law Journal: 177-197.

In his 1955 article, Wade had outlined the traditional concept of parliamentary sovereignty in the following words,

“An orthodox English lawyer, brought up consciously or unconsciously on the doctrine of parliamentary sovereignty stated by Coke and Blackstone, and enlarged upon by Dicey, could explain it in simple terms. He would say that it meant merely that no Act of the sovereign legislature (composed of the Queen, Lords and Commons) could be invalid in the eyes of the courts; that it was always open to the legislature, so constituted, to repeal any previous legislation whatever; that therefore no Parliament could bind its successors; that the legislature had only one process for enacting sovereign legislation, whereby it was declared to be the joint act of the Crown, Lords and Commons in Parliament assembled. He would probably add that it is an invaluable rule that in case of conflict between two Acts of Parliament, the later repeals the earlier. If he were then asked whether it would be possible to “entrench” legislation – for example, if it should wish to adopt a Bill of Rights which would be repealable only by some special safe-guarded process – he would answer that under English law this is a legal impossibility: it is easy enough to pass such legislation, but since that legislation, like all other legislation, would be repealable by any ordinary Act of Parliament the special safeguards would be legally futile. This is merely an illustration of the rule that one Parliament cannot bind its successors.”²⁶⁷

He concluded by characterising Parliament’s sovereignty as “continuing,” asserting therefore that the only limit to Parliament’s legislative power was that “it cannot detract from its own sovereignty.”²⁶⁸

Wade accepted that it was always possible for Parliaments to enact legislation aimed at curtailing the legislative freedom of successor Parliaments, but he argued that the cases of *Vauxhall Estates Ltd v Liverpool Corporation*²⁶⁹ and *Ellen Street Estates Ltd v Minister of Health*²⁷⁰ indicated that “the law-making process was not at the mercy of Parliament for the time being, but was guarded by the courts in order that future Parliaments might be

²⁶⁷ Ibid, p. 174

²⁶⁸ Ibid.

²⁶⁹ [1932] 1 KB 733

²⁷⁰ [1934] All ER 385, [1934] 1 KB 590

unfettered.”²⁷¹ Thus, a vital constitutional function of the courts, required by the doctrine of parliamentary sovereignty, is that they must ensure that the legislative powers of future Parliaments remain unfettered by the enactments of previous Parliaments. This, it seems, could only be achieved by application of the principle of implied repeal, ensuring that the latest will of Parliament is obeyed in preference to any conflicting will manifested in earlier parliamentary enactments.

Wade accepted that the rule that the court must obey and apply the latest will of Parliament was a rule of the common law, but argued that, unlike other common law rules, this particular rule was beyond the reach of statute. In other words, Parliament could not alter the rule by, for example, ordering the courts to disobey future parliamentary enactments inconsistent with a particular Act of Parliament. Wade sought to buttress his argument by quoting from Salmon:

“All rules of law have historical sources. As a matter of fact and history they have their origin somewhere, though we may not know what it is. But not all of them have legal sources. Were this so, it would be necessary for the law to proceed ad infinitum in tracing the descent of its principles. It is requisite that the law should postulate one or more first causes, whose operation is ultimate and whose authority is underived.... The rule that a man may not ride a bicycle on the footpath may have its source in the bye-laws of a municipal council; the rule that these bye-laws have the force of law has its source in an Act of Parliament. But whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate; its source is historical only, not legal.... It is the law because it is the law, and for no other reason that it is possible for the law itself to take notice of. *No statute can confer this power upon Parliament, for this would be to assume and act on the very power that is to be conferred.*”²⁷²

Seizing upon the words in italics above, Wade argued, “if no statute can establish the rule that the courts obey Acts of Parliament, similarly no statute can alter or abolish that rule. The rule is above and beyond the reach of statute....” The rule of absolute judicial obedience to the

²⁷¹ Wade, H. W. R. (1955). "The Basis of Legal Sovereignty." Cambridge Law Journal: 177-197, at p. 176.

²⁷² Jurisprudence, 10th ed. (by Glanville Williams), 155, quoted in Wade, *Ibid*, at p. 187.

latest will of Parliament, he argued, is the “ultimate political fact upon which the whole legal system of legislation hangs.”²⁷³

It has to be made clear that Wade did not contend that the rule of judicial obedience to the latest will of Parliament was always constant and unchangeable. He admitted to the possibility of a change to the rule. However, he insisted that it could not be changed by statute. It is only the courts, prompted by a revolutionary change in the polity, which could effect a change to the rule.²⁷⁴ It would appear therefore, that Wade regards Britain’s membership of the Community, with full knowledge of the implications of the *new legal order*, as such a revolutionary political change prompting the courts to alter the rule of judicial obedience in areas covered by Community law.

Wade’s view that the courts were prompted to alter the rule of judicial obedience to the latest will of Parliament as a result of the changed political atmosphere of a “new legal order” may seem plausible if one were to compare *Factortame* with the earlier cases of *Vauxhall Estates Ltd v Liverpool Corporation*²⁷⁵ and *Ellen Street Estates Ltd v Minister of Health*.²⁷⁶ In those cases, the courts obeyed and applied the inconsistent provisions of the later Act of 1925 despite very clear provision in the earlier 1919 Act stipulating that all subsequent Acts were to be rendered ineffective in so far as they were inconsistent with the terms of the 1919 Act. Going by Wade’s analysis of *Factortame*, it may be argued that the difference in the judicial treatment of *Factortame* on the one hand, and the two earlier cases on the other hand, is that while the 1919 Act was not accompanied by a change in the legal order sufficient to justify a

²⁷³ Ibid.

²⁷⁴ Ibid, p. 189

²⁷⁵ [1932] 1 KB 733

²⁷⁶ [1934] All ER 385, [1934] 1 KB 590

judicial alteration of the rule of judicial obedience to the latest will of Parliament, the 1972 Act was so accompanied. This analysis appears to suggest and emphasise the existence of a judicial power to alter the rule of judicial obedience as changing political circumstances demand.

Wade's radical view that *Factortame* indicated that the courts' would not allow even an express and deliberate parliamentary enactment in breach of directly effective Community law (as far as the United Kingdom remained a member of the Community) enjoys the support of writers such as John Eekelaar²⁷⁷

However, there are those who criticise this interpretation of *Factortame* as wrong. This group of writers prefers to perceive section 2(4) of the 1972 Act as a rule of interpretation enabling the courts to accord primacy to directly effective Community law over all parliamentary enactments unless Parliament clearly, expressly and unequivocally states in a subsequent Act that that Act is to apply notwithstanding any inconsistency with directly effective Community law.²⁷⁸ Allan accepts the practical unreality of the possibility of an express enactment in breach of directly effective Community law, but insists that as a matter of legal theory, British judges must obey any such express breach were it to be enacted by Parliament.²⁷⁹

This latter interpretation seems to accord with judicial perceptions of the interpretative obligation under section 2(4) of the 1972 Act. The "without prejudice" rule of construction

²⁷⁷ See Eekelaar, J. (1997). "The Death of Parliamentary Sovereignty - A Comment." Law Quarterly Review **113**(April): 185.

²⁷⁸ See Craig, P. P. (1991). "Sovereignty of the United Kingdom Parliament after *Factortame*." Y.B.E.L. **11**: 221.

, Allan, T. S. R. (1997). "Parliamentary Sovereignty: Law, Politics, and Revolution." Law Quarterly Review **113**(July): 443-452.

²⁷⁹ Allan, T. S. R. (1997). "Parliamentary Sovereignty: Law, Politics, and Revolution." Law Quarterly Review **113**(July): 443-452, at 445-446

propounded by Lord Bridge, pursuant to the courts' interpretative obligation under that section, appears to have been counter-balanced by what may be termed the "notwithstanding rule." There are indications from the case law that the courts would obey an Act of Parliament containing an express and deliberate provision that the Act is to apply **notwithstanding** any breach of Community law. An inference of this can be drawn from the statement of Lord Diplock in *Garland v British Rail Engineering Ltd.*²⁸⁰ There, his Lordship questioned

"... whether, having regard to the express direction as to the construction of enactments 'to be passed' which is contained in section 2 (4), **anything short of an express positive statement in an Act of Parliament passed after January 1, 1973, that a particular provision is intended to be made in breach of an obligation assumed by the United Kingdom under a Community treaty,**²⁸¹ would justify an English court in construing that provision in a manner inconsistent with a Community treaty obligation of the United Kingdom, however wide a departure from the prima facie meaning of the language of the provision might be needed in order to achieve consistency."

Apparent in this statement is the notion that the courts would obey an Act of Parliament specifically expressed to be intended to apply notwithstanding any inconsistency with directly effective Community law. There is no suggestion that the courts' obligation to obey such an Act would depend upon British withdrawal of membership from the Community. The question of withdrawal itself may be seen as a purely political and diplomatic matter divorced from the legal and constitutional duty of the courts to carry out the clear and unequivocal will of the British Parliament.

The view that the successors of the 1972 Parliament can validly legislate contrary to, and notwithstanding any violation of, Community law, if that is made expressly clear, appears to

²⁸⁰ [1983] 2 AC 751

²⁸¹ Bold type supplied for emphasis.

be shared by Lord Denning as well. When considering the interpretative obligation under section 2(4) of the 1972 Act, in particular, its relationship with an Act of Parliament, in *Macarthys v Smith*²⁸² his Lordship stated *obiter*:

“I pause here, however, to make one observation on a constitutional point. Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfill its obligations under the Treaty. **If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament....**²⁸³ Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty.”

Here again, the perceived duty of the courts to obey an Act expressly derogating from directly effective Community law seems not be conditional upon United Kingdom’s withdrawal of its membership of the Community.

Lord Justice Laws has also expressed his inclination to the construction view, both in his judicial capacity²⁸⁴ as well as in his extra-judicial capacity as a writer.²⁸⁵ Writing extra-judicially, the learned Lord Justice stated that

“... section 2(4) of the European Communities Act falls to be treated as establishing a rule of construction for later statutes, so that any such statute has to be read (whatever its words) as compatible with rights accorded by European law. Sir William Wade regards this development as ‘revolutionary’, because in his view it represents an exception to the rule that Parliament cannot bind its successors. But I do not think that is right. It is elementary that Parliament possesses the power to repeal the European Communities Act in whole **or in part**...²⁸⁶ and the most that can be said, in my view, is that the House of Lords’ acknowledgement of the force of European law means that

²⁸² [1979] 3 All ER 325; [1979] 1 WLR 118

²⁸³ Bold type supplied for emphasis

²⁸⁴ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151, *International Transport Roth GmbH and others v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728

²⁸⁵ Laws, J. (1995). "Law and Democracy." *Public Law*: 72-93.

²⁸⁶ Bold type supplied for emphasis

the rule of construction implanted by section 2(4) cannot be abrogated by implied repeal. Express words would be required.”²⁸⁷

Again, it is apparent that withdrawal of United Kingdom membership is not seen as a pre-condition for judicial obedience of an express statutory derogation from directly effective Community law.

In *Thoburn v Sunderland City Council*,²⁸⁸ Laws sought to explain the exclusion of the principle of implied repeal by introducing the notion of the “constitutional statute.” The issue in the case was whether relevant provisions of the Weights and Measures Act of 1985, which permitted the use of imperial measures for the purpose of trade in the United Kingdom, superseded the power of a Minister under section 2(2) and (4) of the 1972 Act to issue Regulations amending the Weights and Measures Act 1985 so as to prohibit the use of imperial measures and impose the use of metric measures in compliance with relevant Community Directives.

It was argued by counsel that section 1 of the 1985 Act, which permitted the use of imperial measures, must be taken to have impliedly repealed section 2(2) of the 1972 Act, so far as the latter provision purports to authorise the adoption of subsidiary legislative measures prohibiting the use of imperial measures in trade. This argument seemed to be based on the ground that as the 1985 Act was enacted after the 1972 Act, Parliament must be presumed to intend that section 2(2) of the 1972 Act would not apply so as to prohibit the use of imperial measures permitted by the 1985 Act.

²⁸⁷ Laws, J. (1995). "Law and Democracy." Public Law: 72-93.

²⁸⁸ [2002] EWHC 195 (Admin); [2003] QB 151

Laws, LJ, delivering the judgment of the Administrative Court, held that there was no inconsistency between section 1 of the 1985 Act and section 2(2) of the 1972 Act. He went further to state that even if the two Acts were inconsistent with each other, the principle of implied repeal would not apply to the provisions of the 1972 Act. He drew a distinction between what he called “ordinary statutes” and “constitutional statutes.” A “constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.” According to him, while ordinary statutes may be impliedly repealed, constitutional statutes may not. The latter may be repealed only by express words or by words so specific as to infer an irresistible conclusion of Parliament’s intention to repeal.²⁸⁹

These judicial pronouncements indicate that while the courts are prepared to interpret primary legislation in a manner that accords primacy to directly effective Community law in case of inconsistency between the two, they do not perceive the interpretative obligation under section 2(4) of the 1972 Act as enabling them to defy in totality Parliament’s power to deliberately and expressly legislate contrary to Community law. All that the courts require is that an intention to repudiate Community obligations must be made abundantly clear. This of course requires express words that the Act in question is to apply notwithstanding any violation of Community law.

It is submitted that this approach to the interpretative obligation under section 2(4) of the 1972 Act is deceptively modest. As Laws pointed out, requiring Parliament to state its intention to legislate contrary to and notwithstanding directly effective Community law in

²⁸⁹ Ibid, see paragraph. 62-63 of the judgment.

express words hardly seems revolutionary.²⁹⁰ This requirement may in a sense be equated to conventional presumptions of law in the interpretation of statutes touching on fundamental rights and access to justice. For example, there is a presumption that general words are not to be construed as taking away fundamental rights; fundamental rights could only be abrogated by express words or by necessary implication.²⁹¹ Thus, a superficial analysis of the construction approach would tend to see section 2(4) of the 1972 Act as merely a formal (as opposed to a substantive) restraint on Parliament's legislative power to enact laws inconsistent with directly effective Community law.

However, it is submitted that this is a view too simplistic to accept as correct. In the first place, the comparison made between the interpretative presumption required by section 2(4) of the 1972 Act and the conventional interpretative presumptions usually resorted to by the courts is misconceived. Conventional presumptions of law operating, for example, in the area of fundamental rights, could be defeated by necessary implication of the words used in the statute. The same cannot be said of the presumption said to arise from section 2(4) of the 1972 Act. For instance, the wording of the 1988 Act in the *Factortame* cases was quite clear and capable of defeating conventional presumptions by way of necessary implication. Yet, the relevant provisions of the Act were construed without prejudice to directly effective Community law. It would seem therefore, as Lord Diplock appeared to suggest,²⁹² that nothing short of an express and unequivocal statement in an Act, derogating from directly effective Community law could defeat the terms of section 2(4) of the 1972 Act.

²⁹⁰ Laws, J. (1995). "Law and Democracy." Public Law: 72-93.

²⁹¹ See *R v Lord Chancellor, ex parte Witham* [1998] QB 575, [1997] 2 All ER 779, [1998] 2 WLR 849

²⁹² *Garland v British Rail Engineering Ltd* [1983] 2 AC 751

Secondly, the construction view seems to take undue advantage of the practical impossibility of Parliament deliberately and expressly enacting legislation intended to violate directly effective Community law. It can hardly be doubted that while the United Kingdom remains a member of the Community, Parliament would be very much unlikely to seek to repudiate its obligations under Community law. The only real probability of Parliament legislating contrary to directly effective Community law is by way of implied repeal such as happened in the *Factortame* cases. Since the courts have held that the principle of implied repeal is inapplicable to the 1972 Act, the seemingly formal restraint on Parliament's legislative power operates in reality as a substantive rule, more or less, enabling the courts to *disapply* offending primary legislation. As Craig observed, this approach merely "serves to preserve the formal veneer of *Diceyan* orthodoxy while undermining its substance."²⁹³

It is submitted that from whatever perspective one looks at the interpretative obligation under section 2(4) of the 1972 Act, it can hardly be denied that the traditional concept of parliamentary sovereignty has been affected in a considerable way. The debate as to whether the interpretative obligation has enabled the courts to impose substantive restrictions on Parliament's legislative authority (as Wade²⁹⁴ seems to argue) or that it merely imposes formal requirements that could be overcome by express statutory derogations (as Alan²⁹⁵ contends) should not be allowed to becloud the real effect of section 2(4) on the traditional *Diceyan* concept of parliamentary sovereignty. The fact that in the *Factortame* cases, the courts indeed *disapplied* clear and unambiguous provisions in primary legislation on the

²⁹³ Craig, P. P. (1991). "Sovereignty of the United Kingdom Parliament after *Factortame*." *Y.B.E.L.* **11**: 221.

²⁹⁴ Wade, H. W. R. (1996). "Sovereignty - Revolution or Evolution?" *Law Quarterly Review* **112**(October): 568-575.

²⁹⁵ Allan, T. S. R. (1997). "Parliamentary Sovereignty: Law, Politics, and Revolution." *Ibid.* **113**(July): 443-452.

ground that they violated directly effective Community law indicates that the traditional concept of parliamentary sovereignty is, in the eyes of the courts, no longer as it used to be.

While there appears to be a general consensus amongst the judges that section 2(4) of the 1972 Act requires them to give priority to directly effective Community law over inconsistent provisions in an Act of Parliament, whether passed before or after the 1972 Act, there seems to be some difference in approach to the theoretical explanation for the judicial treatment of the interpretative obligation. Two distinctive theories can be identified. The first is what one may, for purposes of convenience, term the theory of voluntariness. This was formulated by Lord Bridge in a passage in his judgment in the second *Factortame* case:

“Some public comments on the decision of the Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.”²⁹⁶

Lord Bridge’s statement above could be interpreted in two ways. First, it could be understood to mean that by according priority to directly effective Community law, the courts are merely carrying out Parliament’s wishes, and not in any way challenging Parliament’s supremacy.

²⁹⁶ [1991] 1 All ER 70, [1990] 3 WLR 818

The courts accord primacy to directly effective Community law simply because Parliament had so directed in section 2(1) and (4) of the 1972 Act. This theoretical approach seeks to clothe the judicial treatment of the interpretative obligation contained in section 2(4) with “democratic legitimacy.”²⁹⁷ If this approach were to be accepted, the implication would be that parliamentary sovereignty could be altered at the whim of Parliament itself. This certainly goes against Wade’s view that “the law-making process was not at the mercy of Parliament for the time being, but was guarded by the courts in order that future Parliaments might be unfettered.”²⁹⁸

This interpretation of Lord Bridge’s theory of voluntariness fails to recognise a distinction between the 1972 Parliament that voluntarily accepted the terms of membership of the Community, and its successor Parliaments. This distinction is important. An essential feature of the traditional concept of parliamentary sovereignty is that sovereignty belongs to the present Parliament. Therefore, whether the 1972 Parliament voluntarily accepted the terms of Community membership should be immaterial to the application of the rule that the courts must obey the latest will of Parliament.

It is perhaps for these difficulties associated with this interpretation of Lord Bridge’s theory of voluntariness that Alan has argued that the theory must be confined to the context in which it was propounded. In other words, it should not be taken as a general rule that whenever Parliament voluntarily accepts a limitation of its sovereignty, the courts must dutifully carry out its instructions. Alan argues that voluntary acceptance of limits to parliamentary authority

²⁹⁷ See Elliott, M. (2002). "Parliamentary Sovereignty and the new constitutional order: legislative freedom, political reality and convention." Public Law: 340.

²⁹⁸ Wade, H. W. R. (1955). "The Basis of Legal Sovereignty." Cambridge Law Journal: 177-197.

should depend on the circumstances; courts must weigh the reasons for and against such limits and decide accordingly.²⁹⁹

Lord Bridge's theory of voluntariness could be interpreted in another way. Parliament's voluntary acceptance of the terms of membership of the Community, with full knowledge of the constitutional implications, is to be seen as constituting a binding contract from which Parliament could not resile while remaining a member of the Community. This interpretation places greater emphasis on the role of the court than the previous interpretation. By this interpretation, British courts appear to be enforcers of the international agreement entered into by the British Government and Parliament. For as long as the United Kingdom remains a member of the Community, the courts would be duty-bound to accord priority to directly effective Community law over United Kingdom Acts of Parliament in accordance with Community legal principles. Thus, Acts of Parliament, pre or post-European Communities Act, would always be interpreted in a manner that accords supremacy to directly effective Community law notwithstanding anything to the contrary contained in the Act. To put it more bluntly, this interpretation of the theory would suggest that not even an express repudiation of the terms of section 2(4) of the 1972 Act would be effective to dislodge the interpretative obligation if the United Kingdom remained a member of the Community.³⁰⁰ It would seem that the only time the courts would cease to give priority to directly effective Community law would be when the United Kingdom formally withdraws its membership of the Community.

²⁹⁹ Allan, T. S. R. (1997). "Parliamentary Sovereignty: Law, Politics, and Revolution." Law Quarterly Review **113**(July): 443-452.

³⁰⁰ See Eekelaar, J. Ibid. "The Death of Parliamentary Sovereignty - A Comment." (April): 185.

While this interpretation accords with the European view of the pre-conditions of membership,³⁰¹ it is submitted that it lacks sound constitutional basis within the domestic constitutional framework of the United Kingdom. There is no constitutional basis for the court acting as an enforcer of international agreements in the manner suggested by the interpretation. Traditionally, Parliament's legislative authority extends to breaking international Treaties. In construing statutes, while the courts may proceed on the presumption that Parliament does not intend to legislate contrary to the terms of an international Treaty, nevertheless, they must obey clear and unequivocal statutory provisions contravening those terms.³⁰²

Furthermore, this interpretation conflicts with other judicial dicta suggesting that the courts would be bound to obey an express and deliberate repudiation of the terms of section 2(4) of the 1972 Act notwithstanding United Kingdom's continued membership of the Community.³⁰³

It is observed that neither of the interpretations above is in tune with hitherto available judicial precedents on the sovereignty of the Parliament of the United Kingdom. Both interpretations have the effect of altering the traditional concept of parliamentary sovereignty. The concept seems not to be seen any more as constant and unchanging. It appears to have been re-conceptualised as a principle that could be altered as the changing political landscape demands.

³⁰¹ See *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26/62, delivered 5 February 1963, *Flaminio Costa v E.N.E.L.*, Case 6/64, delivered 15 July 1964.

³⁰² See *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116; [1966] 3 All ER 871; [1966] 3 WLR 1223

³⁰³ Lord Diplock in *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, Lord Denning in *Macarthys v Smith* [1979] 3 All ER 325; [1979] 1 WLR 1189

The second theoretical explanation for the judicial treatment of section 2(4) of the 1972 Act is contained in the common law theory propounded by Lord Justice Laws. In *Thoburn v Sunderland City Council*,³⁰⁴ Laws contended that it was constitutionally impossible for the Community institutions or Parliament itself to entrench Community law and make Acts of Parliament subject to directly effective Community legislation. The sovereignty of the Parliament of the United Kingdom could not be altered by either of the above entities. He contended that the doctrine of parliamentary sovereignty was rooted in the common law. Therefore, if the doctrine were to be altered, it would be altered, not by Parliament or the Community institutions, but by the common law. He asserts that the common law has now altered it. In his words:

“Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the 1972 Act. It cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal. Thus there is nothing in the 1972 Act which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty. Accordingly there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself. This is, of course, the traditional doctrine of sovereignty. If it is to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the United Kingdom's hands. But the traditional doctrine has in my judgment been modified. It has been done by the common law, wholly consistently with constitutional principle.”³⁰⁵

According to Laws³⁰⁶, the common law has modified the doctrine of parliamentary sovereignty in the following way. The common law has now created an exception to the concomitant principle of implied repeal, which enables and obliges the court to obey and

³⁰⁴ [2002] EWHC 195 (Admin), [2003] QB 151

³⁰⁵ Ibid. See paragraph 59 of the judgment

³⁰⁶ Ibid. See generally paragraphs 60-64 of the judgment

apply the latest Act of Parliament over earlier enactments found to be inconsistent with it. He asserts that there are now classes of statutes that cannot be repealed by implication; they can only be repealed by express words. These statutes he termed “constitutional statutes.” According to him, “a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.” The European Communities Act is such a constitutional statute. He distinguishes these from “ordinary statutes” which can be repealed by implication. The power to classify a statute as a “constitutional statute”, thus immunising it from implied repeal, belongs to the court and the court only. Ultimately therefore, it falls to judges to determine whether in any given case, the doctrine of parliamentary sovereignty should be modified, and to what extent it should be so modified. Indeed, Laws asserts that “the scope and nature of parliamentary sovereignty are ultimately confided” in the courts.³⁰⁷

Lord Justice Laws’ common law theory bears some semblance with Wade’s³⁰⁸ conception of parliamentary sovereignty. Both share the notion that although the doctrine of parliamentary sovereignty is a rule of the common law, it cannot be altered by statute. The doctrine is beyond the reach of Parliament. Parliament cannot alter the rule that the courts must obey the latest Act of Parliament. The doctrine is, in the words of Wade, “in the keeping of the courts.”³⁰⁹ They both contend that it is the courts, and the courts only, that can ultimately determine the validity or otherwise of an Act of Parliament. Finally, both are agreeable to the notion that the courts could alter the doctrine.

³⁰⁷ Ibid, paragraph 60

³⁰⁸ Wade, H. W. R. (1955). "The Basis of Legal Sovereignty." Cambridge Law Journal: 177-197.

³⁰⁹ Ibid, at p. 189

However, their views differ as to how the alteration of the doctrine of parliamentary sovereignty may come about. Wade perceives the doctrine of parliamentary sovereignty as “the ultimate political fact upon which the whole system of legislation hangs.”³¹⁰ Thus, an alteration of the doctrine could only be brought about by a revolutionary change to the existing political reality. This change may either be violent and abrupt, or it may be peaceful and negotiated. The manner in which the change occurs is immaterial. The important thing is that the courts may come to recognise the emergent political fact and act upon it “without any legal justification.”³¹¹ For Wade, the *Factortame* cases indicated a political reaction to the new legal order (the emergent political fact). The judges recognised the new legal order and accorded supremacy to directly effective Community law over domestic legislation. In doing so, they acted without precedent and without any legal justification.³¹²

But for Lord Justice Laws, it is consistent with constitutional principle for the courts to be able to alter or modify the doctrine of parliamentary sovereignty without the requirement of a revolutionary change in the political reality. The doctrine is a creature of the common law. Just like any other rule of common law, it is within the power of the courts to continually examine its applicability in light of contemporary constitutional developments. It would appear therefore, that for Lord Justice Laws, *Factortame* merely indicated that, considering the associated contemporary constitutional developments, it was *ripe* for the judges to modify the doctrine in the manner they did.

³¹⁰ Ibid, at p. 188

³¹¹ Ibid, at p. 188.

³¹² See Wade, H. W. R. (1996). "Sovereignty - Revolution or Evolution?" Law Quarterly Review **112**(October): 568-575.

As can be seen above, Laws' common law theory is fundamentally different from the first interpretation of Lord Bridge's theory of voluntariness given above.³¹³ Lord Bridge's theory places more emphasis on the role of Parliament in seeking to conform to the new legal order imposed by membership of the Community. It tends to portray the courts as merely acting on the instructions of Parliament. By this, responsibility for any resultant modification of the doctrine of parliamentary sovereignty lies with Parliament, not the courts.

On the other hand, Laws' theory places more emphasis on the role of the court in developing common law rules, including the doctrine of parliamentary sovereignty.³¹⁴ In fact, Laws denies Parliament any role in determining the scope and extent of its own legislative authority. Parliamentary sovereignty is controlled by the common law. The common law is itself developed and shaped by the courts over time. Modifications to the doctrine can only occur by a change in relevant rules of the common law as determined by the courts. Thus, for Laws, the determination of the scope and extent of Parliament's legislative authority is a function of the courts.

The idea, put forward by Laws, that although the doctrine of parliamentary sovereignty is a rule of common law, it is nevertheless beyond the reach of Parliament, is difficult to justify. Laws offers no explanation why Parliament could alter all other rules of common law but not the rule of absolute judicial obedience to the latest will of Parliament over earlier inconsistent enactments. Moreover, it is difficult to run away from the reality that the judicial modification of the doctrine of parliamentary sovereignty, as seen in the *Factortame* cases, was prompted by the statutory directive contained in section 2(1) and (4) of the 1972 Act. It

³¹³ See pp. 138-140 above.

³¹⁴ See Elliott, M. (2002). "Parliamentary Sovereignty and the new constitutional order: legislative freedom, political reality and convention." Public Law: 340.

is unlikely that without such a directive contained in the Act, the courts would have accorded priority to directly effective Community law over Acts of Parliament. Therefore, to deny Parliament any role in the resultant modification of the doctrine of parliamentary sovereignty seems to be equivalent to closing ones eyes to reality.

Laws' theoretical explanation for the judicial treatment of section 2(4) of the 1972 Act challenges the traditional concept of parliamentary sovereignty in one way, but at the same time appears to constitute an attempt to reconcile the traditional concept with the apparently irreconcilable European principle of the supremacy of directly effective Community law.

By traditional accounts, parliamentary sovereignty is conceptualised as constant and unchanging. It can be changed neither by Parliament nor by the judges. However, going by Laws theory, parliamentary sovereignty is seen as a common law rule subject to evolutionary change. Indeed, Laws made this clear when he remarked (in the context of fundamental rights) that the evolutionary process had already gone midway.³¹⁵ In his words,

“Not very long ago, the British system was one of parliamentary supremacy pure and simple. Then, the very assertion of constitutional rights as such would have been something of a misnomer, for there was in general no hierarchy of rights, no distinction between ‘constitutional’ and other rights. Every Act of Parliament had the same standing in law as every other, and so far as rights were given by judge-made law, they could offer no competition to the status of statutes. The courts evolved rules of interpretation which favoured the protection of certain basic freedoms, but in essence Parliament legislated uninhibited by claims of fundamental rights.

“In its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy....”³¹⁶

³¹⁵ [2002] EWCA Civ 158; [2003] QB 728

³¹⁶ Ibid, paragraph 70-71 of the judgment

Thus, for Laws, a time may well come when parliamentary sovereignty may have no substance at all.

However, viewed from another perspective, Laws theory could be seen as an attempt to reconcile the traditional concept of parliamentary sovereignty with the practical reality of the primacy of directly effective Community law over national law. By acknowledging that Parliament could in theory derogate from the terms of section 2(4) of the 1972 Act, parliamentary sovereignty is sustained. On the other hand, by imposing formal requirements on the manner in which Parliament must legislate if it intended to derogate from directly effective Community law (i.e. by requiring Parliament to use express words that a statutory provision is intended to apply notwithstanding section 2(4) of the 1972 Act), coupled with the practical unfeasibility of this, priority is given to directly effective Community law. As Mark Elliot observes, Laws' theory "preserves the formal veneer of parliamentary sovereignty while, for all practical purposes, ascribing priority to the law of the European Union."³¹⁷

The totality of the *Factortame* series of cases is indicative of the fact that judges in the United Kingdom now perceive themselves as having the authority to *disapply* a provision of an Act of Parliament that is found to violate directly effective Community rights. The cases, in particular, the one concerning the award of damages, indicate that the courts in the United Kingdom could, as a matter of law, penalise the Government of the United Kingdom even in respect of acts authorised by primary legislation where such legislation is found to be in violation of directly effective Community rights.

³¹⁷ Elliott, M. (2004). "United Kingdom: Parliamentary Sovereignty Under Pressure." International Journal of Constitutional Law **Icon 2.3 (545)**(July): 545.

The significance of the *Factortame* series of cases is that legal grounds could now exist for challenging the validity of an Act of Parliament. Thus, Lord Keith was able to assert in *Regina v Secretary of State for Employment, Ex parte Equal Opportunities Commission & Another*³¹⁸ that in *Factortame*, “provisions of United Kingdom primary legislation were held to be invalid in their purported application to nationals of member states of the European Economic Community.” The “without prejudice” rule of interpretation of statutes touching on directly effective Community law has come to be well accepted by United Kingdom judges. The *EOC* case concerned provisions of the Employment Protection (Consolidation) Act 1978. The Act made provisions³¹⁹ protecting the right of workers not to be unfairly dismissed, and also provided for the right to compensation for unfair dismissal and for statutory redundancy pay. The Act imposed conditions that must be met by various categories of employees before they could lay claim to the benefits of the relevant provisions. Thus, employees who work for 16 hours or more per week could invoke the relevant provisions only if they had been in continuous employment for at least two years. Those who work for between 8 and 16 hours per week must have been in continuous employment for at least five years. Employees who work for less than 8 hours³²⁰ per week were not entitled to the rights provided by the Act.

It was common ground that the vast majority of those working 16 hours or more per week were men, and that the vast majority of those working less than 16 hours per week were women.

In the circumstance, the Equal Opportunities Commission³²⁰ contended that the provisions discriminated against women in that women were treated less favourably than men, contrary to Community law. It therefore sought a declaration that the United Kingdom was in breach

³¹⁸ [1995] 1 AC 1, hereafter referred to as “the *EOC Case*.”

³¹⁹ See sections 54, 64, 68, 71, 81 and 151 as well as Schedule 13 of the Act.

³²⁰ Hereafter simply called “the Commission.”

of its obligations under Article 119 of the Treaty of Rome and the Equal Pay Directive,³²¹ which required it to enact measures securing equal treatment between men and women in all aspects of employment.

Lord Keith, who delivered the lead judgment of the House of Lords, with which the majority³²² of their Lordships agreed, cited *Factortame* as precedent for the action of the Commission.

There was no question of any ambiguity in the statutory provisions concerned. The provisions were clear and precise in their effect. The issue was whether the clear and unambiguous statutory provisions could stand in the face of directly effective Community obligations with which they were incompatible. The Commission was thus relying on, and asserting the principle that directly effective Community law takes priority, and thus overrides the statutory provisions in respect of which it complains.

Following *Factortame*, the House declared that the statutory provisions in question were incompatible with obligations under the Treaty and the Directive mentioned above.

The real effect of this judgment was not expressly made clear by their Lordships. The relief sought was for a declaration only. However, it would appear that a woman adversely affected by the provisions so declared by the House to be incompatible with Community law could invite the court, on the basis of the *EOC* case, to ignore so much of the provisions of the 1978 Act as are incompatible with her rights under Community law. Effectively, this amounts to an

³²¹ 75/117/E.E.C.

³²² Lord Juncey dissenting.

application of the “without prejudice” rule of interpretation propounded by Lord Bridge in the first *Factortame* case.³²³

The *EOC* case could therefore be seen as authority for the proposition that, in a relevant case, the provisions of the Employment Protection (Consolidation) Act 1978 are to be applied by a court of law without prejudice to the directly effective Community rights of women not to be sexually discriminated against in employment. In this way, the court would be fulfilling its interpretative obligation under section 2(4) of the 1972 Act.

A further demonstration of the “without prejudice” rule is to be found in *Imperial Chemical Industries Plc v Colmer (Inspector of Taxes)*.³²⁴ The case involved the construction of provisions of section 258 of the Income and Corporation Taxes Act 1970. A company could claim consortium tax relief if it is a holding company within the meaning of section 258(5)(b), which defined a holding company as “a company the business of which consists wholly or mainly in the holding of shares or securities of companies which are its 90 per cent subsidiaries, and which are trading companies....” Section 258(7) then provided that references to “a company” as used in section 258(5) and other relevant sections of the Act applied to companies resident in the United Kingdom. The result is that for a holding company to qualify for consortium tax relief under the Act, its subsidiary companies must be companies resident in the United Kingdom. It meant therefore that a holding company could not, under the Act, claim consortium tax relief in respect of its subsidiary companies resident in a Member State of the Community other than the United Kingdom.

³²³ [1990] 2 AC 85;

³²⁴ [2000] 1 All ER 129, [1999] 1 WLR 2035

Acknowledging that the plain interpretation of the provisions might violate the directly effective Community rights of companies resident within the Community, in particular, the rights of establishment under Articles 52 and 58 of the Treaty, the House, relying on the dictum of Lord Bridge in *Factortame Ltd v Secretary of State for Transport*,³²⁵ held that

“the effect of section 2 of the 1972 Act is the same as if a subsection were incorporated in section 258 of the 1970 Act which in terms enacted that the definition of ‘holding company’ was to be **without prejudice** to the directly enforceable Community rights of companies established in the Community.”³²⁶

This approach meant that in spite of the clear and unambiguous provisions concerning the residency condition in section 258 of the Income and Corporation Taxes Act 1970, courts are not to apply them if doing so would violate directly effective Community rights. The interpretative obligation under section 2(4) of the 1972 Act enabled courts to disregard primary legislation for the purpose of protecting directly effective Community rights. Thus in *Autologic Holdings Plc v Inland Revenue Commissioners*,³²⁷ Lord Nicholls was able to say, with reference to the interpretative obligation under section 2(4) of the 1972 Act, that courts were “obliged to give effect to all directly enforceable Community rights notwithstanding the terms of section 402(3A) and (3B) and 413(5) of the Income and Corporation Taxes Act.”³²⁸

It is observed that in *Factortame*, the Community measure concerned was one that was directly applicable and thus imbued with automatic direct effect. In cases where Parliament has enacted legislation intended to implement, supplement or otherwise deal with Community obligations arising under a Directive, the interpretative approach adopted by the courts appear to be slightly different from that seen in *Factortame*, although ultimately, the end-result

³²⁵ [1990] 2 AC 85 at 140.

³²⁶ Ibid. See speech of Lord Nolan. Bold type supplied for emphasis.

³²⁷ [2005] UKHL 54, [2006] 1 AC 118

³²⁸ Ibid. See paragraph 17 of the judgment.

remained the same; that is, according priority to directly effective Community law over inconsistent domestic legislation. In *Factortame*, the judges simply ignored the effect of the offending piece of primary legislation, or *disapplied* it as it affected the directly applicable Community rights of the applicants. However, in cases where the courts find that the domestic legislation in question was enacted for the purpose of fulfilling Community obligations under a Directive adjudged to have direct effect, they appear to adopt a purposive approach to interpretation, which enables them to judicially modify otherwise clear and unambiguous provisions in the legislation, in order to ensure compliance with the purpose of the Directive. The courts in the United Kingdom take this approach in all cases in which the provisions of a Directive capable of having direct effect is found relevant in legal proceedings before them.

*Pickstone v Freemans Plc*³²⁹ appears to be the leading case on the purposive approach to interpretation under section 2(4) of the 1972 Act. The relevant statutory provisions in *Pickstone* were section 1(2)(a), (b) and (c) of the Equal Pay Act of 1970 as amended. Section 1(1) of the Act inserts an “equality clause” in the employment contract of every woman where none is included in such a contract. Section 1(2) states the effect of this statutorily inserted equality clause. It ensured that every woman is treated on equal terms with her male colleagues in the same employment. Section 1(2)(a) provided:

“(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the “woman's contract”), and has the effect that—

³²⁹ [1989] AC 66

(a) where the woman is employed on like work with a man in the same employment—³³⁰

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term;”

The statutory protections contained in subparagraphs (i) and (ii) of paragraph (a) above similarly applied in any case falling under paragraph (b), that is:

“(b) where the woman is employed on work rated as equivalent with that of a man in the same employment—...”³³¹

The same protections were extended to cases falling under paragraph (c), that is

“(c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment—...”³³²

³³⁰ Bold type supplied for emphasis.

³³¹ Bold type supplied for emphasis.

³³² Bold type supplied for emphasis.

As can be seen, there were three instances in which a woman could claim the statutory protection offered by the equality clause provided for by the Equal Pay Act 1970. The first concerned cases where the woman was employed in like work with **a**³³³ man. In such a case, any unfavourable discrepancy in entitlements in relation to her male colleague must be made good.

The second instance concerned cases where the woman was employed in work that had been rated, in accordance with section 1(5) of the Equal Pay Act 1970, as equivalent with that of **a**³³⁴ man in the same employment. Here again, the woman was entitled to the same statutory protection if she were put in any disadvantaged position in relation to her male colleague.

The third instance was where the woman was engaged in work of equal value to that of a man in the same employment. Here again, she was entitled to the same statutory protection offered by the equality clause.

The third instance, unlike the first and second instances, contained an exclusionary expression. A woman could claim under paragraph (c) only if (or only when) neither of the instances set out in paragraphs (a) and (b) applied. The operative words were “...not being work in relation to which paragraph (a) or (b) above applies....”

Freemans Plc was a mail order company. The assumed facts of the case were that the company had in its employment two categories of workers relevant to the case. These were warehouse operatives and checker warehouse operatives. There were both male and female

³³³ Bold type supplied for emphasis.

³³⁴ Bold type supplied for emphasis.

workers in each category. That is, there were male and female warehouse operatives as well as male and female checker warehouse operatives.

The applicants were female warehouse operatives. They alleged that a Mr. Phillips who was a checker warehouse operative was being paid a higher wage than they were paid. They further alleged that their work was of equal value with the work of Mr. Phillips within the meaning of section 1(2)(c) of the Equal Pay Act 1970 as amended. According to them, the difference in pay was essentially due to sex discrimination. They therefore claimed equal pay with Mr. Phillips.

The matter went before an Industrial Tribunal. The applicants lost. An appeal to the Employment Appeal Tribunal was also unsuccessful. The applicants further appealed to the Court of Appeal.

Before the lower tribunals, the employers, Freemans Plc, contended that the applicants were barred from claiming under section 1(2)(c) of the Equal Pay Act 1970 because they were engaged in like work with a man (though not with Mr. Phillips) within the meaning of paragraph (a) of the same subsection. This was the case since paragraph (c) excluded any case to which paragraph (a) or (b) applied.

On the other hand, the applicants contended that paragraph (c) would exclude them from claiming only if they were engaged in like work, not with just any man, but with Mr. Phillips with whom they had compared themselves. Accordingly, since they were not engaged in like work with Mr. Phillips, they were entitled to claim equal pay with Mr. Phillips under paragraph (c).

The main issue before the Court of Appeal therefore, was whether the exclusionary words contained in paragraph (c) of the relevant subsection operated to exclude a woman who claimed equal pay with a man doing work of equal value with her when there was in fact another man doing like work with her and being paid the same wages as she was being paid.

The entire case depended upon the construction of the above exclusionary words. The question was whether the words operated to exclude the applicants from claiming under paragraph (c) as they were engaged in like work with a male warehouse operative even though that male warehouse operative was different from Mr. Phillips in respect of whom they made their complaint. The employers argued that paragraphs (a) and (b) referred to “a man” and that by the ordinary principle of interpretation, this meant *any man*, not necessarily the man with whom a woman compares herself. It followed therefore, that since the applicants were engaged in like work with a male warehouse operative and was being paid the same wages as he was being paid, they were barred or excluded from claiming under paragraph (c) no matter the merits of their complaint in respect of their chosen comparator.

As originally enacted, section 1(2) of the Equal Pay Act 1970 was without paragraph (c). Only paragraphs (a) and (b) were provided for. That meant that a woman could invoke the statutory protection offered by the equality clause provided by section 1(1) of the Act in two instances only. First, where she was engaged in like work with a male colleague, she could invoke the statutory protection. She could also do the same where she was engaged in work that had been rated as equivalent with that of a male colleague under a job evaluation study undertaken by her employer. She had no protection outside of these instances.

The practical effect of the law at that time was that a woman who was engaged in different work, but work of equal value with a man, could be paid less wages than a man so far as the employer undertook no job evaluation study to determine that the two jobs were of equivalent status in terms of demands.

It must be noted that at the time the Equal Pay Act 1970 was originally enacted, no Community law implications existed since the United Kingdom had not been admitted into the Community. However, with the entry of the United Kingdom into the Community on 01 January 1973, the country became bound to comply with the provisions of Article 119 of the Treaty of Rome, which guaranteed the principle of equal pay for men and women throughout the Community, and required the Member States to ensure its application within their domestic legal systems.

The principle of equal pay, as embodied in Article 119, is broad and seeks to eliminate all forms of pay discrimination based on sex. It says:

“Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, " pay " means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement

(b) that pay for work at time rates shall be the same for the same job.”

In 1975, the Council of the European Communities adopted Council Directive 75/117/E.E.C.³³⁵ The Directive disapproved of existing differences in the implementation of the Equal Pay Provisions of the Treaty amongst Member States and directed Member States to take measures to fully implement the principle. Article 1 of the Directive is of particular importance. It asserted that the Equal Pay Principle contained in Article 119 required the elimination of all forms of sexual discrimination in employment. It says:

"The principle of equal pay for men and women outlined in article 119 of the Treaty, hereafter called 'principle of equal pay,' means, for the same work or for work to which equal value is attributed, the elimination of **all**³³⁶ discrimination on grounds of sex with regard to all aspects and conditions of remuneration.”

One can clearly see that Article 119, as explained by the Equal Pay Directive, was meant to eliminate all forms of employment discrimination based on sex. Therefore, under Community law, no exception was to be allowed for sexual discrimination in employment. Once it is found that an existing discrimination is based on sex, Community law enables the aggrieved person to seek remedy.

At this juncture, it is important to compare the rights of a woman with respect to sexual discrimination under the then existing United Kingdom law on the one hand, and Community law on the other hand. This is necessary because, as mentioned earlier, in construing the exclusionary words in contention, the court has to use the effect of the directly applicable

³³⁵ Hereafter called “the Equal Pay Directive” or simple “the Directive.”

³³⁶ Bold type supplied for emphasis.

Community obligation as a controlling guide, and must ensure that the Community obligation prevails over any inconsistent provision contained in the domestic legislation.

It would appear from the wording of the above paragraphs (a) and (b) that a woman would not be able to claim equal pay with a man whose work was different, (in the sense that it was not of like work with the woman's) but was of equal value with her work, if it was the fact that there was a man who did like work with the woman and received the same pay as her.

Again, under the Act, a woman who was not engaged in like work with a man in accordance with paragraph (a) above could invoke the equality clause only if a job evaluation study (carried out pursuant to section 1(5) of the Act) had rated her work as equivalent to the work of the man with whom she compared herself. The job evaluation study could only be carried out with the consent of her employer. It meant therefore, that in practice, a woman could be effectively denied any remedy where no such job evaluation study was carried out even though it was quite clear that the two jobs concerned were of equivalent value.

On the other hand, Article 119 of the Treaty of Rome, as well as the Equal Pay Directive, were meant to eliminate all forms of discrimination based on sex. The prohibition was meant to be total. There were to be no permitted instances of discrimination based on sex. A woman was entitled to equal pay for like work as well as for work of equal value. She could claim equal pay with a man engaged in work of equal value even if some man was at the same time engaged in like work with her and was receiving the same pay as her. In other words, a woman's claim to equal pay was not to be restricted to that of a man doing like work as her. It was also not to be dependent on a job evaluation study that could only be carried out with the consent of the very employer against whom she would be seeking the remedy.

While the United Kingdom Government felt that the above provisions of the Equal Pay Act 1970, as then amended by the Sex Discrimination Act of 1975, were adequate and duly fulfilled her obligations under Article 119 and the Equal Pay Directive, the Commission of the Community had a contrary view. The Commission felt that United Kingdom legislation did not go far enough in ensuring the elimination of all forms of discrimination based on sex. In particular, it felt that a woman should be able to seek remedy even without a system of job evaluation, for all forms of sexual discrimination in employment.³³⁷

Consequently, the Commission filed proceedings against the United Kingdom before the European Court³³⁸ seeking a declaration that the United Kingdom had failed to fulfill its obligation under the Equal Pay Directive to adopt legislation ensuring the application of the Principle of Equal Pay for men and women.

The European Court found that under the existing domestic legislation, a woman who alleged that she was engaged in work of equal value with a man could not obtain remedy for sex discrimination in the absence of a job evaluation study that could only be carried out with the consent of her employer. It decided that this was unacceptable. It ruled that an independent Authority should be able to determine the issue of “equal value” of the jobs being compared so as to enable an aggrieved individual to pursue equal pay claims even in the absence of a job evaluation scheme.

³³⁷ See *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, Case 61/81.

³³⁸ *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, Case 61/81.

Accordingly, the Court declared that the United Kingdom had failed to fulfill its obligation under Article 119 to ensure the application of the Principle of Equal Pay, as aggrieved persons were unable to pursue equal pay claims under the Equal Pay Act 1970 without the requisite job evaluation study.

One significant implication of the decision is that the scope of the Principle of Equal Pay is quite wide. It was meant to eliminate all forms of sexual discrimination without exceptions. There should be no grounds for excluding a woman from legal protection whenever it could be proved that she did work of equal value with a man.

Following the decision of the European Court, the United Kingdom introduced an amendment to section 1(2) of the Equal Pay Act 1970 intended to comply with the decision. This was the Equal Pay (Amendment) Regulations 1983.³³⁹ Regulation 2 introduced a new paragraph (c) set out earlier. This was to enable a woman who claimed that she was engaged in work of equal value with a man in the same employment to invoke the equality clause in the absence of a job evaluation study.

In the Court of Appeal, the judges were unanimous that the provisions of paragraph (c) were clear and unambiguous.³⁴⁰ They ruled that by the ordinary principles of interpretation, the exclusionary words contained in the paragraph operated to exclude the applicants from claiming under the paragraph because of the fact that they were engaged in like work with a man in accordance with paragraph (a).

³³⁹ S.I. No. 1794 of 1981.

³⁴⁰ Nicholls, Purchas and Cumming-Bruce, LLJ.

All the judges acknowledged that the European Principle of Equal Pay as outlined both in the Treaty and the Equal Pay Directive had direct effect and could be relied upon by the applicants independently of the Equal Pay Act 1970.

However, the judges differed on the way they approached the interpretative obligation under section 2(4) of the 1972 Act. Nicholls, LJ, while admitting that paragraph (c) failed to cure the mischief that it was intended to cure and that the paragraph did not go far enough as required by Community law, held nevertheless, that paragraph (c) ought to be left as it was. He said,

“...given that the exclusionary words are unambiguous and are not reasonably capable of the meaning which would carry out the United Kingdom's treaty obligations in this field, for my part, as at present advised, I have great difficulty in seeing how the effect of section 2(4) of the European Communities Act 1972 in such a case can be to require the English court, nevertheless, to ascribe some other, artificial meaning to those words.”

For Lord Justice Nicholls (as he then was), it would appear that the courts are not obliged, under section 2(4) of the 1972 Act, to interpret legislation compatibly with directly applicable Community law if the legislative provision in question is clear and unambiguous. To him, this is the case even if the unambiguous provision appears to fall short of the requirements of directly applicable Community law. The interpretative obligation under section 2(4) would only be activated if the legislative provision were ambiguous and perhaps capable of both a meaning compatible with Community law and a meaning incompatible with Community law.

With utmost respect to Nicholls, LJ, this approach cannot be right. The significance of the interpretative obligation under section 2(4) of the 1972 Act is that it enables the court to interpret domestic legislation in a manner that accords priority to directly applicable

Community law. There is nothing in section 2(4), either expressly or by necessary implication, which restricts the application of the interpretative obligation contained therein to only situations where the domestic legislation is ambiguous. The directive to construe legislation compatibly with directly applicable Community law is emphatic. It says such legislation “shall be construed and have effect subject to” directly applicable Community law.

The directive contained in section 2(4) of the 1972 Act appears to go even further than that contained in section 3(1) of the Human Rights Act 1998.³⁴¹ There, the courts are directed to construe legislation compatibly with the Convention rights “so far as it is possible to do so.” There is no such qualifying clause in section 2(4) of the 1972 Act.

As a matter of law, where the provisions of domestic legislation are ambiguous, the ordinary principles of interpretation would be sufficient to take care of the situation. In that case, the interpretative principle that Parliament is presumed not to legislate in breach of its international obligations could be relied upon to construe the legislation compatibly with the international obligations.³⁴²

It is submitted therefore, that the interpretative obligation under section 2(4) of the 1972 Act may require a court to construe inconsistent domestic legislation compatibly with directly effective Community law even if the resultant interpretation may depart from the unambiguous provisions of the offending legislation. In short, section 2(4) authorises judicial amendment of inconsistent domestic legislation for the limited purpose of ensuring compliance with directly applicable Community law.

³⁴¹ See chapters 5 and 6 below.

³⁴² See chapters 2 and 3 above.

Thus, Purchas, LJ, was able to say in the instant case, that by virtue of section 2(4) of the 1972 Act, the court could construe section 1(2) of the Equal Pay Act 1970 compatibly with the directly effective Community obligation by “inserting the words necessary to achieve a result that is not inconsistent with Community law.” According to him, “this could be achieved by amending the relevant part of section 1(2)(c) to read ‘... not being work which can more fairly be compared under paragraph (a) or (b) above.’”

Admittedly, “this involves an otherwise unjustifiable qualification of what are in fact clear words.”³⁴³ Nevertheless, this is authorised by section 2(4) of the 1972 Act.

On appeal to the House of Lords, their Lordships³⁴⁴ endorsed the approach of Purchas on the section 2(4) issue. Lord Templeman expressed the opinion that words must be implied into the provisions of paragraph (c) to make it consistent with Community law. Lord Oliver observed that this involved “departure from a number of well-established rules of construction” being that the legislative provisions under scrutiny were clear and unambiguous. However, he expressed the view that it was justified by section 2 of the 1972 Act.

It is submitted that the approach taken by their Lordships is a correct application of the interpretative obligation required by section 2(4) of the 1972 Act. *Pickstone v Freemans* can be seen as authority for the proposition that courts can judicially amend provisions in an Act of Parliament enacted specifically to implement Community obligations if this were necessary for the purpose of ensuring full compliance with directly effective Community

³⁴³ [1995] 1 AC 1, per Purchas, LJ.

³⁴⁴ Lords Keith, Brandon, Templeman, Oliver and Jauncey.

obligations. In such a case, it is immaterial that the statutory provision in question is clear and unambiguous in the sense that it is ordinarily capable of only one meaning.

The approach adopted by the House of Lords in *Pickstone v Freemans* was applied in *Litster & Others v Forth Dry Dock & Engineering Co. Ltd & Another*.³⁴⁵ The case involved the interpretation of provisions of the Transfer of Undertakings (Protection of Employment) Regulations 1981, which were designed to implement obligations under Council Directive 77/187/E.E.C. of 14 February 1977. Article 3(1) of the Directive safeguarded the contract of employment between a transferor and its employees existing at the date of the transfer of the business of the transferor to a transferee. The intention of course, was to protect the employment of workers and to prevent the transferee from dismissing the workers on account of the transfer.

Regulation 5(1) of the 1981 Regulations was made in accord with Article 3(1) of the Directive. It read:

“A relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.”

Paragraph (3) of Regulation 5 then attempted to define the persons protected by paragraph (1) above in the following words:

³⁴⁵ [1990] 1 AC 546

“Any reference in paragraph (1)... above to a person employed in an undertaking or part of one transferred by a relevant transfer is a reference to a person so employed **immediately before**³⁴⁶ the transfer, including, where the transfer is effected by a series of two or more transactions, a person so employed immediately before any of those transactions.”

In the case, the applicants were employees of the transferor company. The company became insolvent and went into receivership. Subsequently, the receivers agreed to transfer the business to the transferee. One hour before the transfer, the receivers dismissed the applicants. Within 48 hours after the dismissal of the applicants, the transferee began to employ new workers at lower pay rates. The applicants took out legal proceedings against the transferor (joining the transferee later), alleging unfair dismissal.

The main issue that arose before the House of Lords was whether, having regard to the fact that the transferor dismissed the applicants, at least one hour before the transfer actually occurred, the protection of Regulation 5(1) was available to them. In other words, could the applicants be regarded as persons employed by the transferor “immediately before” the transfer as provided by paragraph (3) of Regulation 5?

Their Lordships agreed that by the ordinary principles of interpretation, the applicants could not be regarded as persons employed “immediately before” the transfer. However, they felt able to construe the provision in a manner that brought the applicants within the ambit of the protection of Regulation 5(1) by straining the language of paragraph (3). According to Lord Templeman,

³⁴⁶ Bold type supplied for emphasis.

“Regulation 5(3) must be construed on the footing that it applies to a person employed immediately before the transfer **or who would have been so employed if he had not been unfairly dismissed before the transfer for a reason connected with the transfer.**”³⁴⁷

In adopting this approach, their Lordships were merely fulfilling the interpretative obligation under section 2(1) and (4) of the 1972 Act. As already noted, the domestic Regulations were designed to implement the Council Directive. The European Court had in *P. Bork International A/S v. Foreningen af Arbejdsledere I Danmark*³⁴⁸ interpreted the provisions of Article 3(1) of the Directive (corresponding with the United Kingdom Regulation 5(1)) as applying to employees dismissed by the transferor before the transfer took place, if the dismissal was for a reason connected with the transfer.

Their Lordships were thus obliged to adopt a purposive interpretation of Regulation 5(3) that would be consistent both with the underlying purpose of the Directive, which was to protect employees from unfair dismissals connected with the transfer of undertakings, and also with the jurisprudence of the European Court on the point. This latter point is of great significance. Section 3(1) of the 1972 Act obliges the courts to treat questions of Community law as questions of law, and to determine such questions in accordance with principles laid down by the European Court.

Thus, in *Webb v Emo Air Cargo (UK) (No.2)*³⁴⁹ the House of Lords felt able to construe provisions of sections 1(1)(a) and 5(3)(a) of the Sex Discrimination Act 1975 in a manner that complied with the decision of the European Court in a preliminary ruling on the point in

³⁴⁷ [1990] 1 AC 546. Bold type supplied for emphasis.

³⁴⁸ Case 101/87

³⁴⁹ [1995] 4 All ER 577; [1995] 1 WLR 1454

question even though the resultant interpretation was in dissonance with an earlier interpretation of the statutory provisions given by the House following ordinary principles of statutory interpretation.³⁵⁰

Section 1(1)(a) of the Sex Discrimination Act 1975 provided as follows:

“(1) ... a person discriminates against a woman if—

(a) on the ground of her sex he treats her less favourably than he treats or would treat a man, ...”

Section 5(3)(a) then provided that “a comparison of the cases of persons of different sex under section 1(1)... must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.”

Mrs. Webb had been employed by the Respondent Company to provide cover for an employee who would be proceeding on maternity leave in a few months time. However, her employment was for an indeterminate period and she was therefore to continue even after the resumption of duty of the employee whose duties she was to cover at the beginning. She was asked to start immediately so that she could undergo necessary training preparatory to taking over from the employee going on maternity leave.

Two weeks into her new job, Mrs. Webb discovered that she was pregnant. She informed her employers of the pregnancy and was immediately dismissed. She took out proceedings in an industrial tribunal alleging discrimination on the ground of her sex contrary to section 1(1)(a) of the Sex Discrimination Act 1975 set out above. The industrial tribunal dismissed the claim

³⁵⁰ See *Webb v Emo Air Cargo* (UK) [1992] 4 All ER 929, [1993] 1 WLR 49

on the ground that her dismissal was not based on grounds of her sex, but on her anticipated inability to take over the duty of the employee due for maternal leave, the purpose for which she was employed in the first place. The Employment Appeal Tribunal as well as the Court of Appeal upheld the decision of the industrial tribunal.

On Appeal to the House of Lords³⁵¹, the House held that on the proper construction of sections 1(1)(a) of the Sex Discrimination Act, read in conjunction with section 5(3)(a) set out above, Mrs. Webb was not discriminated against on grounds of her sex because the real reason of her dismissal was her inability to take on the job for medical reasons; and that applying the comparison required by 5(3)(a), a man in a similar situation who was unable to perform his duties for medical reasons would likewise have been dismissed. This interpretation was without regard to Community law.

In acknowledgement of their interpretative obligation under section 2(4) of the 1972 Act, the House made a reference to the European Court seeking a preliminary ruling on the effect of Article 2(1) of Council Directive (EEC) 76/207³⁵² in the circumstances of Mrs. Webb's case. The proceedings were stayed pending the ruling of the European Court.

The European Court subsequently ruled that the dismissal of a female employee employed for an indeterminate period for inability to temporarily perform her job due to pregnancy would amount to discrimination based on sex contrary to the Equal Treatment Directive. The Court further ruled that the situation of such a female employee could not be compared to

³⁵¹ Webb v Emo Air Cargo (UK) [1992] 4 All ER 929, [1993] 1 WLR 49

³⁵² Dealing with the implementation of the principle of equal treatment for men and women in employment, hereafter called the Equal Treatment Directive.

that of a man because pregnancy, which was the relevant factor, could only happen to a woman.

Upon receipt of the ruling of the European Court, the House felt obliged, and accordingly construed the relevant provisions of the 1975 Act set out above, in a manner that gave full effect to Community law and complied with the ruling of the European Court.

By these decisions, it would appear that the House of Lords have taken the view that the courts must adopt a purposive construction of domestic legislation, primary or subsidiary, in order to comply with the demands of Community law even if such an approach would result in an interpretation that might be inconsistent with the meaning and effect of the legislation upon its ordinary construction.

By the ordinary principles of interpretation, the power of the court to depart from the ordinary meaning of the words used in an Act, or to modify the provisions of the Act by judicially inserting words into it, is not to be exercised if the purpose is merely to fill a gap detected by the court.³⁵³ In such a case, it is for Parliament to pass legislation and fill the gap in a manner that it deems fit. It is not the duty of the court to fill the gap on its own initiative.

The purposive approach to interpretation pursuant to the provisions of section 2(1) and (4) of the 1972 Act may appear to have the effect of enabling the court to fill a gap detected in domestic legislation. Where legislation falls short of the requirements of directly applicable Community law, the courts now feel able to imply words to the otherwise clear and unambiguous provisions of an Act for the purpose of ensuring compliance with directly

³⁵³ *Re DWS (Deceased)*, *Re EHS (Deceased)*, *TWGS v JMG & Others* All England Official Transcripts, judgment delivered by Court of Appeal on 09 November 2000. See generally, chapter 3 above.

applicable Community law. This is a power that was unavailable to the courts under the ordinary common law rules of statutory interpretation.³⁵⁴

IV. Conclusion

The aim of this chapter has been to examine the way in which the courts have approached the interpretative obligation contained in section 2(1) and (4) of the 1972 Act and to consider what impact the interpretative obligation has had on judicial attitudes to the traditional concept of parliamentary sovereignty.

As has been seen, the case law seems clear as to how the courts perceive their obligation under section 2(4) in particular. Since the *Factortame* cases were decided, it seems to have been generally accepted that section 2(4) requires the courts, in construing domestic primary legislation, to accord supremacy to directly effective Community law in case there is a conflict between the two.

It is observed that the judges have tended to play down the resultant modification of the traditional concept of parliamentary sovereignty. For example, Lord Bridge's approach attempts to cloth the judicial function under section 2(4) as nothing more than following the instructions of Parliament.³⁵⁵ Also, although Lord Justice Laws' common law approach gave greater emphasis on the role of the court under section 2(4) of the 1972 Act, he attempts to explain the impact as merely consisting of some modest modification of the principle of implied repeal.³⁵⁶

³⁵⁴ See Chapter 3 above

³⁵⁵ [1991] 1 All ER 70, 3 WLR 818

³⁵⁶ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151

It is submitted that neither approach should becloud the profound impact that the interpretative obligation contained in section 2(4) has had on judicial attitudes to the traditional concept of parliamentary sovereignty. One only has to compare the case law dealt with in chapter 2 above with the case law dealing with section 2(4) to appreciate the significant shift in the attitude of the courts with respect to the traditional *Diceyan* concept of parliamentary sovereignty. The hitherto unchanging judicial dogma of parliamentary sovereignty that was seen in the cases discussed in chapter 2 now appears to have given way to pragmatism. There seems to be a consensus that necessary modifications to the doctrine may occur from time to time, as constitutional developments occur. Whether this should occur according to the wishes of Parliament, as Lord Bridge appeared to suggest, or as a result of the evolutionary development of the common law by the judges, as Lord Justice Laws contends, is not abundantly clear at the moment.

CHAPTER 5

THE HUMAN RIGHTS ACT: GENERAL

I. Introduction

This chapter explores the general scheme as well as examines the essential provisions of the Human Rights Act 1998. The aim is to provide the necessary background upon which the examination of the case law in the next chapter will be done.

II. General Scheme and Essential Provisions of the Act

The pre-Human Rights Act position concerning the Convention was that its provisions had no force of law in the domestic courts of the United Kingdom, having not been incorporated into law by an Act of Parliament.³⁵⁷

As an unincorporated international treaty, the Convention's domestic usefulness as a means of vindicating the fundamental rights guaranteed by it was quite limited. While the courts would approach the interpretation of legislation touching on the Convention rights on the presumption that Parliament does not intend to legislate in breach of the international obligations arising under the Convention, it had always been accepted that the Convention would not stand in the way of clear and unambiguous legislation found to breach its terms.

In addition to the interpretative presumption, which the courts made in favour of the Convention rights when interpreting legislation, the courts also resorted to the use of the principle of legality as a means of protecting fundamental rights³⁵⁸ within the domestic legal

³⁵⁷ See *Regina v Secretary of State for the Home Department, ex parte Brind and others* [1991] 1 AC 696. See also *Regina v Lyons and others* [2002] UKHL 447; [2003] 1 AC 976.

³⁵⁸ In the United Kingdom, at least before the enactment of the 1998 Act, so-called *fundamental* or *constitutional* rights were not embodied in a Bill of Rights, or a constitutional text as is the case, for example, in the United States, where the Constitution guarantees a set of fundamental rights. In the United Kingdom, fundamental rights owed their existence to the common law.

system. Laws, J,³⁵⁹ very clearly articulated the principle in *R v Lord Chancellor, ex parte Witham*.³⁶⁰

“In the unwritten legal order of the British state, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by **specific**³⁶¹ provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate. **General words will not suffice.**”³⁶²

Thus, while Parliament could legislate to abrogate, or authorise the abrogation of fundamental rights, general words would not suffice to take away those rights; they could only be overridden by specific words or by necessary implication.³⁶³

The above was the legal and constitutional status of the Convention rights before the enactment of the 1998 Act. It was that state of affairs that the Government sought to improve upon. As the long title of the Act states, it is “an Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights.”³⁶⁴

Obviously, the fullest means of “giving further effect” to the Convention rights would have been to accord the rights priority over primary legislation. However, there seemed to have been no intention, on the part of the Government,³⁶⁵ to abandon the traditional doctrine of parliamentary sovereignty, by which Acts of Parliament take priority over every other form

³⁵⁹ As he then was.

³⁶⁰ [1998] QB 575, [1997] 2 All ER 779; [1998] 2 WLR 849.

³⁶¹ Bold type supplied for emphasis.

³⁶² Bold type supplied for emphasis.

³⁶³ See also *Regina v Secretary of State for the Home Department, ex parte Pierson* [1998] A.C. 539, at 573G-575D, 587C-590A.

³⁶⁴ It is submitted that the phrase, “give further effect” as used in this context, should be interpreted as referring to the totality of provisions in the 1998 Act designed to offer remedial measures necessary for the fulfilment of United Kingdom’s obligations under the terms of the Convention. These necessarily include not only remedies grantable by the courts (such as section 3 interpretations), but also executive and legislative remedial measures (such as those provided by section 10).

³⁶⁵ As promoters of the Human Rights Bill.

of law. In the White Paper³⁶⁶ preceding the introduction of the Human Rights Bill into Parliament, the Government made it clear that, based on democratic grounds, it intended to preserve parliamentary sovereignty in the scheme of the 1998 Act. According to the White Paper:

“The Government has reached the conclusion that the courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the Government attaches to Parliamentary sovereignty. In this context, Parliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes. In enacting legislation, Parliament is making decisions derived from a democratic mandate. Members of Parliament in the House of Commons possess such a mandate because they are elected, accountable and representative. To make provision for the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasion to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest that they desire this power, nor that the public wish them to have it. Certainly, this Government has no mandate for any such change.”³⁶⁷

³⁶⁶ Home Department (1997). *Rights Brought Home: The Human Rights Bill*. Home Department, The Stationery Office. **Command Paper No. Cm 3782**

³⁶⁷ Ibid. See paragraph 2.13. While it might be rather far-reaching to claim, without research, that the British public did not desire the courts to have the power of judicial review of legislative enactments, statements by some senior judges suggested that the generality of the judiciary supported the view that judges should not be able to override primary legislation on grounds of incompatibility with the Convention rights. For example, writing extra-judicially, Lord Steyn said: “Given the recognition of those rights (i.e. Convention rights) a practical problem remains. How can those rights best be protected? For us in England two problems remain. First, there is the question whether the European Convention on Human Rights should be enacted as part of our

As would be recalled, in the 1972 Act, the combined effect of section 2(1) and (4) and section 3(1) ensured that directly effective Community law took priority over primary legislation.³⁶⁸ In the 1997 White Paper,³⁶⁹ the Government explained that this was so only because it was “a requirement of membership of the European Union that member States give priority to directly effective EC law in their own legal systems.” It argued that there was no such requirement concerning the Convention. Consequently, in principle, nothing stood in the way of the doctrine of parliamentary sovereignty.

Nevertheless, it would appear that “giving further effect” to the Convention rights would involve a delicate balancing of respect for the doctrine of parliamentary sovereignty on the one hand, and the need to provide for an effective means of protecting the rights guaranteed under the Convention. This balance, it would seem, found expression in sections 2, 3, 4, 6, 10 and 19 of the 1998 Act.

Section 2(1) of the Act concerns the interpretation of the Convention rights.³⁷⁰ It reads:

“(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

domestic law. If I thought for one moment that such an enactment of the convention would entail a greater transfer of political power to judges I would oppose it. It will mean nothing of the kind. It will simply mean that issues of alleged abuses of human rights law will be tried in our courts rather than in Strasbourg. It should be a matter of national pride for us to put our house in order in the field of human rights. I therefore strongly favour the enactment of the convention as part of our law. But I do not have in mind some kind of superior law. The enactment of the convention should be subject to the overriding principle of parliamentary supremacy.” See Steyn (1997). “The Weakest and Least Dangerous Department of Government.” *Public Law Spring*: 84-95.

See also Woolf, H. (1998). “Judicial Review - The Tensions Between the Executive and the Judiciary.” *Law Quarterly Review* 114(October): 579-593.

³⁶⁸ See Chapter 4 above.

³⁶⁹ op. cit., supra, note 366, at paragraph 2.12

³⁷⁰ As distinguished from interpretation of domestic legislation, which is provided for in section 3.

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.”

The above provisions clearly apply in equal measure to both inferior and superior courts and tribunals.³⁷¹ The use of the word “must” in section 2(1) indicates that it is obligatory for the court to comply with the demands of the sub-section, that is, to take into account the decisions of the European bodies stipulated therein, as far as they are relevant to the proceedings before the court.

However, the statutory obligation to take into account European decisions, including those of the European Court, on questions of Convention rights, does not mean that any such decision would be binding on the court,³⁷² no matter how inferior it is. What this means is that the domestic courts may not treat the jurisprudence of the European Court on matters of the

³⁷¹ Cf. section 4(5), which confines the judicial power to make declarations of incompatibility to superior courts only.

³⁷² See McGoldrick, D. (2001). "The United Kingdom's Human Rights Act 1998 in Theory and Practice." *International and Comparative Law Quarterly* **50(4)**: 901 - 953.

Convention rights as strict legal precedents. This is a marked departure from the provisions of section 3(1) of the 1972 Act,³⁷³ whereby the courts were statutorily obliged to apply the jurisprudence of the European Court of Justice on questions of Community law, including the European principles of direct applicability, direct effect and the supremacy of directly effective Community law.³⁷⁴ Thus, under the 1972 Act, the court is obliged to apply the jurisprudence of the European Court of Justice in preference to clear and unambiguous provisions contained in primary legislation if there is a clash between the two. It would appear that no such obligation was intended under section 2 of the 1998 Act. The conclusion to be drawn from the difference between the respective provisions in the 1972 Act and the 1998 Act noted above is that section 2 in the latter Act was meant to be part of the mechanism within the scheme of the 1998 Act aimed at preserving the doctrine of parliamentary sovereignty.

Nevertheless, in practice, the domestic courts of the United Kingdom are likely to treat decisions of the European Court with the seriousness they deserve, as, ultimately, domestic disputes might go to the European Court for adjudication after exhaustion of all domestic avenues for remedy. Indeed, Lord Bingham has stated that “the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”³⁷⁵ And Francis Bennion has expressed the opinion that “it would be absurd (i.e. for a

³⁷³ Together with the reference procedure and the preliminary ruling mechanism of Article 234 of the EEC Treaty. See Chapter 4 below.

³⁷⁴ See Thompson, R. (2005). "Community Law and the Limits of Deference." European Human Rights Law Review 3: 243 - 258.

³⁷⁵ *R v (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 A.C. 323. See paragraph 40 of the judgment. A good example of how the domestic courts have taken the jurisprudence of the European Court seriously could be seen in their use of the European doctrine of proportionality, a doctrine “that had been firmly rejected by the domestic courts in the pre-Human Rights Act era.” See Foster, S. (2006). "Measuring the success of the Human Rights Act." Coventry Law Journal 11(2): 41 - 59.

United Kingdom court) to arrive at a legal meaning of a Convention right different from that likely to be found by the European Court of Human Rights.”³⁷⁶

The Government’s proposals for enforcing the Convention rights³⁷⁷ eventually materialised in sections 3, 4 and 10 of the 1998 Act. Section 3 of the Act concerns the interpretation of primary and subordinate legislation, and provides as follows:

“3.— Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.”

As is clear from the provisions of section 3(2)(a), the interpretative obligation contained in section 3(1) is applicable to all legislation, whether enacted before or after the 1998 Act. Consequently, to the extent that previous legislation affects the Convention rights, the

³⁷⁶ Bennion, F. (2000). "What interpretation is "possible" under section 3(1) of the Human Rights Act 1998?" *Public Law*(Spring): 77-91.

³⁷⁷ As outlined in Chapter 2 of the White Paper, op. cit., supra, note 366.

meaning and effect of such legislation as established by previous case law would not constitute binding precedent to be followed. Thus, all such legislation would now be re-interpreted in the light of the interpretative obligation in section 3(1).³⁷⁸ It has been held however, that the directive contained in section 3(1), to interpret legislation compatibly with the Convention rights, would not apply if its application would have the effect of altering vested interests in transactions which took place before the coming into force of the 1998 Act.³⁷⁹

Section 3(1) is perhaps the most controversial section of the 1998 Act. The subsection, as has been noted, directs the courts to interpret all legislation “so far as it is possible to do so” compatibly with the Convention rights. In the pre-Human Rights Act jurisprudence on questions of the Convention rights, the precise limit of interpreting domestic legislation compatibly with the Convention rights seemed clear enough. The courts would interpret domestic legislation compatibly with the Convention rights in cases where the legislation concerned was ambiguous and a Convention-compatible interpretation was a viable alternative interpretation.³⁸⁰ Where the offending legislation concerned was clear and unambiguous in the sense that it was capable of only one meaning, the courts would not strain that meaning in order to satisfy the demands of the Convention. In that case, the will of Parliament would be respected and the legislation would be left for Parliament to amend by itself if it thought fit to do so.

The problem inherent in section 3(1) is that it contains no statutory definition of what is “possible” under the subsection. However, several judges and academic commentators have expressed opinion that, unlike the pre-Human Rights Act situation, no ambiguity is necessary

³⁷⁸ See paragraph 2.8 of the White Paper, *op. cit.*, *supra*, note 366.

³⁷⁹ See *Wilson v First County Trust Ltd* [2003] UKHL 40; [2003] 4 All ER 97; [2003] 2 All ER (Comm) 491.

³⁸⁰ See generally Chapter 2 and 3 above.

for a statutory provision to be subjected to a section 3(1) interpretation; furthermore, an interpretation pursuant to the interpretative obligation contained therein may permissibly lead to conclusions that differ from the plain meaning of the statutory provision in question.

Lord Irvine,³⁸¹ writing extra-judicially at a time the Human Rights Bill was still in Parliament, asserted that

“... the Act will require the courts to read and give effect to [the] legislation in a way compatible with the Convention rights ‘so far as it is possible to do so...’ This, as the White Paper makes clear, goes **far beyond**³⁸² the present rule. It will not be necessary to find an ambiguity. On the contrary the courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is **so clearly**³⁸³ incompatible with the Convention that it is impossible to do so.”³⁸⁴

It seems that Lord Irvine’s interpretation of the interpretative obligation contained in section 3(1) was not based on any extensive analysis of section 3 as a whole,³⁸⁵ together with the provisions of section 4 and 10, all of which make up the Government’s Proposals for enforcing the Convention rights as outlined in the White Paper to which he referred. The sole basis of his statement would appear to be paragraph 2.7 of the White Paper. His statement was in fact almost a complete repetition of that paragraph in the White Paper. It is observed that, contrary to Lord Irvine’s declaration above, neither Clause 3(1) in the then Human Rights Bill, nor section 3(1) in the 1998 Act indicated clearly that the new rule of interpretation went “far beyond” the subsisting rule, or that no ambiguity was necessary in order to activate the section 3(1) interpretation.

³⁸¹ Who introduced the Human Rights Bill into the House of Lords.

³⁸² Bold type supplied for emphasis.

³⁸³ Bold type supplied for emphasis.

³⁸⁴ Irvine (1998). "The Development of Human Rights in Britain under an Incorporated Convention on Human Rights." Public Law: 221-236.

, See also Irvine (2003). "The Impact of the Human Rights Act: Parliament, the Courts and the Executive." Public Law: 308-325.

³⁸⁵ That is, including subsection 2 thereof.

Besides, Lord Irvine's statement above, as quite rightly noted by Geoffrey Marshall,³⁸⁶ seems intrinsically contradictory in terms. If the new interpretative obligation went "far beyond" the subsisting rule such that no ambiguity was required to interpret the legislation under consideration compatibly with the Convention right, it would mean that, absenting a provision that specifically states that the legislation was to apply notwithstanding any breach of the Convention rights,³⁸⁷ a very clear and unambiguous provision would not prevent a court from finding a Convention-compatible interpretation. A legislation without such a *notwithstanding* provision might yet be "so clearly incompatible" and therefore unambiguous. Under the *old* rule, such unambiguous legislation would trump the Convention rights. Under the new rule, it was not supposed to. Yet, Lord Irvine's statement suggests that a provision "so clearly incompatible" with the Convention rights could, just as it is with the old rule, trump the Convention rights.

Unlike the above statement, his related statement written in a later article³⁸⁸ took cognisance of the relationship between sections 3 and 4³⁸⁹, both of which were designed to "bring rights home."³⁹⁰ There, His Lordship stated:

"The Human Rights Act is founded upon a division of functions between the different branches of government, which reflects the British conception of the separation of powers principle on which our constitution is based. Under the Act our courts have to interpret statutes 'so far as possible' to be compatible with Convention rights; if this is impossible they have been given a unique power to declare legislation to be incompatible, but then it is for the executive to initiate, and Parliament to enact, remedial legislation, with a fast track process available for that purpose. This balance which inheres in the text of the Act can be secured in practical terms only by a

³⁸⁶ Marshall, G. (2003). "The Lynchpin of Parliamentary Intention: Lost, Stolen, or Strained?" Public Law: 236.

³⁸⁷ Or words to the like effect.

³⁸⁸ Irvine (1999). "Activism and Restraint: Human Rights and the Interpretative Process." European Human Rights Law Review 4: 350-372.

³⁸⁹ Together with section 10.

³⁹⁰ A term used in the White Paper (op. cit., supra, note 366) to describe the underlying rationale of the 1998 Act.

measured response to the challenge of seeking, so far as is possible, to interpret national law consistently with the Convention.

“If the courts were to adopt a very narrow view of this duty of consistent construction, their ability interpretatively to guarantee Convention rights would be severely curtailed. Instead of reading municipal law in a way which gave effect to individuals’ rights, the courts would tend to discover irreconcilable conflicts between United Kingdom law and the Convention which would then require legislative correction. In contrast, a judiciary which took an extremely radical view of its interpretative duty would be likely to stretch legislative language, beyond breaking point, if necessary, in order to effect judicial vindication of Convention rights. Such an approach would yield virtually no declarations of incompatibility: the judges would, in effect, be taking it upon themselves to rewrite legislation in order to render it consistent with the Convention, and so excluding Parliament and the executive from the human rights enterprise.

“Both of these approaches would be wrong. The constitutional theory on which the Human Rights Act rests is one of balance.”³⁹¹

It is submitted that this is a more acceptable perception of the interpretative obligation in section 3(1). Most writers who take a radical view of the interpretative obligation, asserting that it empowers the courts to ignore the intention of Parliament in enacting the offending legislation, appears to isolate section 3(1) from the rest of the remedial provisions of the Act, such as sections 4 and 10 which, together with section 3, constituted the mechanism by which the Government proposed to enforce the Convention rights. This is a wrong approach to interpreting the extent of what is possible under section 3(1).

The error inherent in this approach could be seen in an article written by Lord Cooke³⁹² at the period between the enactment of the 1998 Act and the coming into effect of its substantive provisions. There, His Lordship proclaimed that “our old friend Parliamentary sovereignty will never be the same again.”³⁹³ He had a radical view of the interpretative obligation in section 3(1), arguing that no ambiguity was required for a court to find and apply a

³⁹¹ Irvine (1999), op. cit., supra, note 388, at 366-367.

³⁹² Cooke (1999). "The British Embrace of Human Rights." European Human Rights Law Review 3: 243-260.

³⁹³ Ibid, p. 244

Convention-compatible interpretation.³⁹⁴ He appeared to support his argument by asserting that a reduction of United Kingdom cases in Strasbourg was a motivating factor in enacting the 1998 Act;³⁹⁵ thus, “the Act could become a dead letter if the canon of interpretation laid down by section 3(1) were not followed in spirit....”³⁹⁶ The necessary implication of His Lordship’s argument is that section 3(1) is the only remedial provision in the Act, by which Convention rights were brought home. Thus, a failure to use section 3(1) is seen as equivalent to a failure to achieve the objective of the Act. It is submitted with respect that this is wrong. In the White Paper³⁹⁷ preceding the Human Rights Bill, the proposals culminating in sections 3, 4 and 10 were all outlined under the Heading: “The Government’s Proposals for Enforcing the Convention Rights.” Conceivably, “giving further effect to rights and freedoms”³⁹⁸ under the Convention referred to the totality of remedial measures provided in the Act, and not only to section 3(1) interpretations. Admittedly, there are practical differences in effectiveness between the remedies that may accrue from sections 3 and 4. However, the fact remains that the work of delivering the Convention rights locally to Britain was meant to be a shared enterprise between the courts, the executive and Parliament, each expected to play its proper role. Failure to use section 3(1) interpretation in a given case is not necessarily equal to a negation of the objective of the 1998 Act.

³⁹⁴ Ibid, pp. 249-253. See similar statement His Lordship made in *R v Director of Public Prosecutions, ex parte Kebeline and others*; *R v Director of Public Prosecutions, ex parte Rechachi* [1999] 4 All ER 801; [1999] 3 WLR 972; [2000] 1 Cr App Rep 275

³⁹⁵ Cooke, op. cit., supra, note 392, at p. 247.

³⁹⁶ Ibid, p. 256

³⁹⁷ op. cit., supra, note 366.

³⁹⁸ See the long title of the 1998 Act

Lord Hope, also writing in the transitional period between the enactment of the 1998 Act and the commencement of its substantive provisions, described the interpretative obligation contained in section 3(1) as “a far-reaching one.”³⁹⁹ He contended that

“the requirement in s. 3(1) is to search for a ‘possible’ reading. This may lead to conclusions which depart from the ordinary meaning of the words used, and would not be produced by the application of any of the other usual canons of construction⁴⁰⁰ which were in the mind of the legislator.”⁴⁰¹

Similarly, Lord Nicholls asserts that section 3 “may require a court to depart from the meaning which, s. 3 apart, legislation unambiguously bears.”⁴⁰²

As can be seen, there seemed to be fairly broad agreement amongst the senior judiciary, in their extra-judicial writings, that section 3(1) would enable the courts to find a Convention-compatible meaning even where the statutory words used in an offending statute are neither ambiguous nor absurd. Much of the claim that no ambiguity is required for a section 3(1) interpretation to be engaged seems to be based on statements made in Parliament during the course of parliamentary debates on the Human Rights Bill. But was this made unequivocally clear in the parliamentary proceedings?

The Lord Chancellor had stated that the Bill was designed “to give the courts as much space as possible to protect human rights, short of a power to set aside or ignore Acts of Parliament”⁴⁰³

³⁹⁹ Hope (1999). “The Human Rights Act 1998: The Task of the Judges.” Statute Law Review 20(September): 185.

⁴⁰⁰ See generally Chapters 2 and 3 above.

⁴⁰¹ Hope, op. cit., supra, note 399..

⁴⁰² Nicholls, D. (2005). “My Kingdom for a Horse: The Meaning of Words.” Law Quarterly Review 121(October): 577-591.

⁴⁰³ Hansard (HL) of 03 November 1997: Column 1228.

Both in the House of Lords and the House of Commons, amendments were moved to delete the word “possible” appearing in clause 3(1) of the Bill and replacing it with the word “reasonable.”⁴⁰⁴

The purpose of the amendments sought was, in the words of Mr. Clappison, “to ensure that the clearly expressed will of Parliament is heeded if incorporation takes place.”⁴⁰⁵

It was felt that allowing judges to interpret legislation compatibly with the Convention rights as far as they possibly can may “encourage the courts to give an unduly artificial interpretation to statutory language.”⁴⁰⁶

Mr. Gieves and Mr. Swayne expressed similar sentiments.⁴⁰⁷

They appeared to hold the view that clause 3(1) of the Human Rights Bill, which became section 3(1) of the 1998 Act, could ground a far-fetched but otherwise possible interpretation of primary legislation.

In response to these attempts to replace the word “possible” with the word “reasonable”, the then Home Secretary, Jack Straw, revealed that in drafting clause 3(1) of the Bill, the Canadian and New Zealand models of incorporation of Bills of Rights were particularly examined.⁴⁰⁸

⁴⁰⁴ Hansard (HL) of 18 November 1997: Column 533. Lord Kingsland moved Amendment No. 15. See also Hansard (HC) of 03 June 1998: Column 415. Mr. Clappison (representing Hertsmere) moved Amendment No. 9.

⁴⁰⁵ See Clappison, *Ibid*, Column 415.

⁴⁰⁶ *Ibid*, Column 417-418, per Mr. Hogg (representing Sleaford and North Hykeham).

⁴⁰⁷ *Ibid*, Column 418-419.

⁴⁰⁸ *Ibid*, Column 419-420.

Section 32 of the Canadian Charter of Rights and Freedoms contained in the Constitution Act of 1982 makes the provisions of the Charter applicable to all legislation, subject only to the exceptions contained in section 33 of the Charter. Section 33(1) and (2) in particular, contain the following provisions:

“(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter (i.e. the rights and freedoms guaranteed by the Charter).

“(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.”

Properly interpreted, these provisions meant that absented a declaration pursuant to section 33(1) of the Charter, the rights and freedoms guaranteed by the Charter trump any inconsistent primary legislation. Accordingly, the courts can validly strike down such legislation.

The Government, for the reason that it was inimical to the doctrine of parliamentary sovereignty, which is the bedrock of the British constitution, rejected this model.

On the other hand, section 6⁴⁰⁹ of the New Zealand Bill of Rights Act of 1990⁴¹⁰ provides that “wherever an enactment can be given a meaning that is consistent with the rights and

⁴⁰⁹ Which is roughly the equivalent of section 3(1) of the British Human Rights Act 1998

⁴¹⁰ As amended by the New Zealand Human Rights Act of 1993

freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”

Clearly, this provision reflects the position of British jurisprudence on the status and role of the Convention in the interpretation and application of primary legislation pre-Human Rights Act. The Convention rights only came into play when the provisions of primary legislation were found to be ambiguous. In that case, the principle that Parliament does not intend to legislate in breach of the Convention rights is then activated. The result is that an interpretation that conforms to the Convention rights is to be preferred.

Again, the Government rejected this model of incorporation. Of course, if the Human Rights Act were to make any difference to the existing state of the law, adopting a model such as the New Zealand model will prove to be superfluous.

Having considered, and subsequently rejected these options, the Government had to come up with “a British answer to a British problem”⁴¹¹, that of delivering Convention rights in as effective a manner as possible while preserving parliamentary sovereignty.

The result (and supposedly, the solution) was section 3(1) of the Act. “...While...the courts would have clear powers to apply the European convention ... ultimately Parliament’s will would prevail.”⁴¹²

From the above, far from giving any clear indication that under section 3(1), courts were empowered to change the clear and unambiguous meaning of legislation that is not even

⁴¹¹ Hansard (HC) of 03 June 1998: Column 420, per Jack Straw

⁴¹² Ibid, per Jack Straw

absurd in its proper context, the parliamentary material indicates that the underlying concept adopted by the Government and Parliament in enacting the 1998 Act was that there should be a principled balance between effective protection of Convention rights on the one hand, and the need to respect the sovereignty of Parliament on the other hand. Therefore, while section 3(1) empowers courts to interpret primary legislation in a way that is compatible with the Convention rights, section 4 makes it clear that where the statutory provision under consideration is such that a section 3(1) interpretation is impossible⁴¹³, the court is not to alter the provision in question but is to make a declaration of incompatibility under section 4, which may then set in motion the taking of remedial action by the appropriate minister under section 10 of the Act. As can be seen, section 4, together with section 10 of the Act, serves as a reminder to the courts that the doctrine of parliamentary sovereignty and the principle of the separation of powers are preserved by the Act and are to be respected by the courts.

As indicated earlier, several academic commentators share the view, held by their Lordships in their extra-judicial writings above, that under section 3(1) of the 1998 Act, courts could depart from a clear and unambiguous statutory provision in order to render it Convention-compatible. In fact, some have expressed the opinion that section 3(1) sanctions an interpretation that might be contrary to the intention of Parliament in enacting the offending legislation. For example, David Feldman states:

“The interpretative duty of courts and tribunals under s. 3 is not based on either the presumed intention of the legislature or a need to resolve a textual ambiguity in the legislation. Encouraging courts to be creative in the interpretation and application of Convention rights and legislation which affects them, the 1998 Act may lead to an interpretation of legislation which is directly contrary to that intended by the promoters and drafters of other Acts. This makes it difficult to rely on legislative intent to justify judicial action in these cases, and changes the use which judges have previously made of Convention rights in interpreting or developing the law. Strictly speaking, it does not threaten parliamentary sovereignty, because Parliament itself has

⁴¹³ No doubt, the impossibility could only be determined by the language used in the statutory provision under consideration.

decreed that judges should behave in accordance with s. 3. It simply imposes an additional burden on drafters of legislation intended to be incompatible with a Convention right to make their intention **absolutely clear and unequivocal**.⁴¹⁴

If section 3(1) authorised the courts to override the intention of Parliament, as has been suggested by Feldman above, its practical effect would be little different from what obtains in the United States or Nigeria, countries with rigid, written constitutions that authorise the courts to overrule legislative enactments on grounds of inconsistency with constitutionally guaranteed fundamental rights. Feldman suggests that that was what the Government and Parliament intended the 1998 Act to achieve. With respect, it is submitted that this is neither borne out by the White Paper, nor made clear from the language of section 3(1) of the Act. In the White Paper,⁴¹⁵ it was stated that “The Government ... considered very carefully whether it would be right for the Bill to go further, and give to courts in the United Kingdom the power to set aside an Act of Parliament which they believe is incompatible with the Convention rights.” The Government concluded that courts should have no such power. A power to override legislative intention embodied in an Act of Parliament can reasonably be equated to a power enabling a court to set aside such an Act.

Feldman’s suggestion that, to avoid a section 3(1) interpretation, legislative draftsmen must make it “absolutely clear and unequivocal” that the Convention rights are intended to be breached, implies that only a statute containing a provision specifically and expressly stating that the statute is to apply *notwithstanding* any breach of the Convention rights, would be protected from a judicial override. It is submitted that such a fundamental and innovative idea

⁴¹⁴ Feldman, D. (1999). "The Human Rights Act and Constitutional Principles." Public Law: 165.

⁴¹⁵ *op cit.*, *supra*, note 366. See paragraphs 2.11-2.13

would have required clearer language.⁴¹⁶ Yet, all that section 3(1) of the 1998 Act states is that courts should interpret domestic legislation compatibly with the Convention rights “so far as it is possible to do so.” As Gearty states:

“... it is unlikely that the courts will go so far as to require that section 3 take priority over all law, however framed, in the absence of an express claim by Parliament to the opposite effect. If the judges were to construe section 3(1) in this way, then a type of entrenchment against implied repeal would have been smuggled into UK law disguised as a principle of statutory interpretation.”⁴¹⁷

Similarly, writing on the role of parliamentary intention in adjudication under section 3(1) of the 1998 Act, Aileen Kavanagh⁴¹⁸ has argued that the original intention of Parliament in enacting a particular piece of legislation must give way to the intention of Parliament expressed in section 3(1) should there be a clash between the two intentions. Although she admits that traditionally, by the doctrine of implied repeal, a later Act of Parliament impliedly repeals inconsistent terms contained in an earlier Act, she insists that this does not apply to the interpretative obligation contained in section 3(1) since the obligation was expressed to apply to legislation “whenever enacted.” Thus, the courts are empowered under section 3(1) to change the meaning and effect of primary legislation and depart from Parliament’s original intention if this were necessary to achieve compatibility with the Convention rights.

Although, admittedly, the wording of section 3(1) of the 1998 Act seems to support the view that all legislation, pre- and post Human Rights Act, are susceptible to a section 3(1) interpretation, there seems to be nothing in it to suggest in any clear manner that the intention

⁴¹⁶ Cf. the situation concerning the 1972 Act, where section 2(1) and (4) and section 3(1) gives better indication that directly effective Community law would take precedence over an Act of Parliament except the Act contains such a *notwithstanding* clause. See chapter 4 above.

⁴¹⁷ Gearty, C. A. (2002). "Reconciling Parliamentary Democracy and Human Rights." Law Quarterly Review **118**(April): 248-269.

⁴¹⁸ Kavanagh, A. (2005). "Unlocking the Human Rights Act: The 'Radical' Approach to section 3(1) Revisited." European Human Rights Law Review **3**: 259-275.

See also Kavanagh, A. (2006). "The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998." Oxford Journal of Legal Studies **OJLS 2006 26 (179)**: 179.

expressed in section 3(1) must trump any other intention expressed in all other Acts in case of a clash between the two. In relation to subsequent legislation, such an interpretation of the interpretative obligation under section 3(1) would contradict the traditional rule that courts must obey and apply the latest will of Parliament in preference to inconsistent provisions in earlier legislation. Traditionally, all Acts are equal in status and could be repealed or altered by the ordinary means of legislation either expressly or by necessary implication. Thus, in *Ellen Street Estates Ltd v Minister of Health*,⁴¹⁹ the court refused to apply a strongly worded provision in section 7(1) of the Acquisition of Land (Assessment of Compensation) Act of 1919 purporting to restrict the power of future Parliaments to legislate in a manner inconsistent with its terms. It is submitted that the wording of section 7(1) of the 1919 Act appears much stronger than that contained in section 3(1) of the 1998 Act. Yet, in the *Ellen Street* case the court ruled that the intention of Parliament expressed in the Housing Act of 1925 impliedly repealed the parliamentary intention expressed in section 7(1) of the 1919 Act.⁴²⁰

Francis Bennion's analysis of the role of parliamentary intention in a section 3(1) interpretation is somewhat less sweeping than that of David Feldman and Aileen Kavanagh. While Feldman appeared to contend that under section 3(1), the courts could ignore the parliamentary intention embodied in an offending Act altogether, Bennion only says that "Parliament's original intention is no longer the **sole**⁴²¹ deciding factor" when interpreting primary legislation pursuant to the interpretative obligation.⁴²² He argues that while the

⁴¹⁹ [1934] All ER 385, [1934] 1 KB 590

⁴²⁰ See generally, Chapter 2 above.

⁴²¹ Bold type supplied for emphasis.

⁴²² See Bennion, *op. cit.*, *supra*, note 376, at p. 91.

original intention of Parliament “retains its importance, it must now be reassessed in the light of the new rule” embodied in section 3(1) of the 1998 Act.⁴²³

It is submitted that this is a better assessment of the interpretative obligation *vis a vis* the intention of Parliament embodied in an offending legislation. It is submitted that the resultant interpretation in accordance with section 3 should reasonably fit into the underlying objective of the offending legislation. In this way, the courts would be complementing Parliament’s desire to meet the United Kingdom’s obligations under the Convention whenever possible. Otherwise, it might amount to a judicial override of Parliament’s clear intention expressed in the legislation.

Other academic commentators have disagreed with the view that section 3(1) of the 1998 Act empowers the courts to disregard, or refuse to apply what they determine to be the intention of Parliament in an Act, on grounds of incompatibility with the Convention rights. Geoffrey Marshall has attacked it as lacking in coherence:

“The thesis that the ‘possibility’ referred to in s. 3 describes an array of conceivable Convention-compatible meanings in accordance with which the true intention of Parliament may (within uncertain limits) be departed from or reconstructed has defied coherent expression.”⁴²⁴

It is difficult not to agree with this assessment. Arguments that section 3(1) of the 1998 Act authorises courts to ignore the clear and unambiguous intention of Parliament embodied in an offending legislation when interpreting that legislation pursuant to section 3(1) are almost always accompanied by apparently contradictory statements that the courts are nevertheless required to obey and apply it if it is so clearly incompatible.

⁴²³ Ibid.

⁴²⁴ Marshall, *op. cit.*, *supra*, note 386, at p. 241

As mentioned above, those who hold such radical view of the interpretative obligation in section 3(1) often tend to support their argument with the assertion that that was what the Government, as promoters of the 1998 Act, intended the subsection to mean. Marshall has argued that while that might be the Government's view and preference, "it is not the logic of the Act or the stated intention of Parliament."⁴²⁵ He further argues that such an interpretation of section 3(1) would be "potentially damaging both to the authority of Parliament and the separation of the judicial and legislative functions."⁴²⁶

It is observed that much of the commentary on the use of section 3(1) in the interpretation of primary legislation touching on the Convention rights tends to ignore completely the provisions of section 3(2)(b) of the Act. The paragraph states that the provision in section 3(1) (i.e. in relation to the interpretation of primary legislation) "does not affect the validity, continuing operation or enforcement of any incompatible primary legislation." Gearty⁴²⁷ outlined two possible approaches to determining what is possible under section 3(1). While the first approach seeks to define the extent of the court's power of interpretation under section 3(1) by reference to section 3(2)(b), the second tends to completely ignore the effect of section 3(2)(b). The first approach places greater emphasis on section 3(2)(b), using it as some sort of saving provision, with the effect that any interpretation under section 3(1) that would have the practical effect of affecting the "validity, continuing operation or enforcement" of the incompatible statute would be impossible under section 3(1). Considering that a judicial interpretation of an offending statute, pursuant to the interpretative obligation in section 3(1), would most certainly mean that that statute would henceforth operate, not in its original state, but as if amended by the judgment, a perception of section 3(1) in this way would render the interpretative obligation almost totally useless. This

⁴²⁵ Ibid, at p. 243

⁴²⁶ Ibid, at p. 248

⁴²⁷ op. cit., supra, note 417, at pp.250-255

analysis of the interpretative obligation, as Gearty says, finds favour with those “whose commitment to Parliamentary sovereignty exceed their devotion to human rights.”⁴²⁸ This is hardly the principled balance between respect for parliamentary sovereignty and the protection of the Convention rights which seems to underlie the 1998 Act.

The second approach is, according to Gearty, “diametrically opposite”⁴²⁹ the first. By this approach, an extremely expansive interpretation is to be given to the word “possible” as used in section 3(1) such that unless an express repudiation of the Convention rights is contained in a statute, it could be judicially amended to render it compatible with the Convention rights. Thus, whether the resultant interpretation pursuant to section 3(1) would affect the “validity, continuing operation or enforcement” of the statute so interpreted would be immaterial. Clearly, this approach would more or less constitute some form of entrenchment of the Convention rights, an idea strongly rejected by the Government in its White Paper.⁴³⁰

Gearty suggests a mid-way approach, stating that while the limits of what is possible under section 3(1) should be identified by reference to section 3(2)(b), the latter provision should only be used as a guide. “Thus, section 3(1) should be able to operate creatively upon a provision, but until such a time as a proposed reading would have the effect of so impairing the operation and/or effectiveness of the clause under scrutiny as to render it for all practical purposes a dead letter, or close to a dead letter.”⁴³¹

It is submitted that this approach to determining the limit of what is possible under section 3(1) seems to be closest to the principled balance between adhering to the doctrine of parliamentary sovereignty on the one hand, and giving further effect to the Convention rights

⁴²⁸ Ibid, at p. 253.

⁴²⁹ Ibid.

⁴³⁰ Op. cit., supra, note 335.

⁴³¹ Gearty, op. cit., supra, note 417, at p. 255-256

on the other hand, as envisaged both in the White Paper and in the general scheme of the 1998 Act.

It is worth noting that section 3(1) of the 1998 Act bears a huge resemblance with the principle of legality. The principle of legality is an interpretative principle of high constitutional importance. It has its root in the common law. It is a presumption of general application applied to all enactments touching on the basic legal rights of the individual. Essentially, by the application of the principle of legality, powers derived under an Act of Parliament are required to be exercised in a manner that leaves untouched the fundamental rights of the individual, however wide and general those powers appear to be, unless the clear intention of Parliament was to take away those rights.

The principle of legality was well articulated by Lord Browne-Wilkinson in *Regina v Secretary of State for the Home Department, Ex parte Pierson*.⁴³² Drawing on the works of Cross,⁴³³ Bennion⁴³⁴ and Maxwell on Statutory Interpretation,⁴³⁵ his Lordship stated:

“I consider first whether there is any principle of construction which requires the court, in certain cases, to construe general words contained in the statute as being impliedly limited. In my judgment there is such a principle. It is well established that Parliament does not legislate in a vacuum: statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions.... As a result, Parliament is presumed not to have intended to change the common law unless it has clearly indicated such intention either expressly or by necessary implication....”⁴³⁶

⁴³² [1998] A.C. 539

⁴³³ Cross, R. (1995). Cross: Statutory Interpretation. London, Butterworths.

⁴³⁴ Bennion, F. (2008). Bennion on Statutory Interpretation. London, LexisNexis.

⁴³⁵ Langan, P. (1969). Maxwell On The Interpretation Of Statutes, LexisNexis Butterworths.

⁴³⁶ [1998] A.C. 539 at 573, paragraph G-H.

After reviewing a number of important decisions where the principle of legality was applied,⁴³⁷ his Lordship went on to state that the case law has established that

“A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.”⁴³⁸

Thus, the principle of legality can be seen as a principle that allows the courts to adopt a value oriented approach to interpretation, designed to incorporate ideas of the Rule of Law into the construction and application of statutes. Accordingly, executive decisions based on statutory provisions must be taken in accordance with established, even if noncodified, principles of law designed to guarantee fairness and justice.

Traditionally, the courts have used the principle of legality as an interpretative tool by which the fundamental rights of the individual are protected from encroachment by executive bodies exercising powers conferred upon them by primary or subordinate legislation. The principle has two remarkable elements. First, it has been generally accepted that it is a constitutional principle of general application.⁴³⁹ This means that its operation is not dependent upon statutory authority. It operates independently of statute. It is part of what Cross refers to as “long-standing principles of constitutional and administrative law ... taken for granted, or assumed by the courts to have been taken for granted, by Parliament.”⁴⁴⁰ The principle is of fundamental, constitutional importance, and as Cross states, it is not a

⁴³⁷ *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531; *Raymond v. Honey* [1983] 1 A.C. 1; *Reg. v. Secretary of State for the Home Department, Ex parte Leech* [1994] Q.B. 198; and *Reg. v. Lord Chancellor, Ex parte Witham* [1997] 2 All E.R. 779.

⁴³⁸ [1998] A.C. 539 at 573, paragraph C-D.

⁴³⁹ See for example, statement of Lord Steyn in *Ex parte Simms* [2000] 2 A.C. 155

⁴⁴⁰ Cross, *op. cit.*, *supra*, note 433, at p. 165.

principle that is easily displaced by a statutory text.⁴⁴¹ Thus, it has been consistently held by the courts that only a deliberate parliamentary repudiation of fundamental rights could prevent the court from protecting those rights by use of the principle. As Lord Hoffman remarked in *Regina v Secretary of State for the Home Department, Ex parte Simms*,⁴⁴²

“the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have been passed unnoticed in the democratic process. In the absence of clear language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”

The most obvious means by which the principle of legality can be displaced by Parliament is by use of express words in a statute abrogating fundamental words. However, as indicated in the above passage by Lord Hoffman, it may also be displaced by necessary implication; that is, where, though not expressly stated, the language used in the statute leads to the inescapable conclusion that Parliament intended to abrogate fundamental rights. Consequently, a clear limitation of the principle is that in the face of clear, contrary parliamentary intention, it must give way to the doctrine of parliamentary sovereignty.

The second remarkable element of the principle of legality is that there need be no ambiguity in a statutory provision for the principle to apply for the purpose of protecting fundamental rights. This is because, as stated earlier, general and wide provisions, even though unambiguous in language, are subject to the presumption that fundamental rights are left untouched. The relevant consideration is whether those rights have been specifically targeted

⁴⁴¹ Ibid, at p. 166.

⁴⁴² [2000] 2 A.C. 155

in a deliberate manner either expressly or by necessary implication. If the answer is negative, then the interpretative principle of legality would apply to protect fundamental rights from being breached.

As can be seen, the resemblance between section 3(1) and the common law principle of legality is striking. They are both interpretative principles of general application operating, as Cross put it, “at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts.”⁴⁴³ No linguistic ambiguity is needed in either case for the interpretative principles to apply. While both must necessarily bow to the doctrine of parliamentary sovereignty, only a deliberate abrogation of fundamental rights could stop a court from utilising them for the purpose of protecting fundamental rights. Unsurprisingly therefore, Lord Hoffman has described section 3(1) of the 1998 Act as a statutory re-statement of the principle of legality.⁴⁴⁴ Perhaps the only significant difference between the two is that while the principle of legality applies in general to all the basic rights of the individual founded on the common law, the interpretative principle embodied in section 3(1) of the 1998 Act can only be applied in the context of the Convention rights domesticated by the Act.

Nevertheless, in terms of effectiveness in the protection of basic rights, it would appear that United Kingdom courts seem able to go much further in protecting fundamental rights acting under section 3(1) of the 1998 Act than they ordinarily would when applying the principle of legality in the common law context. Section 3(1) can be seen not only as a mere re-statement of the principle of legality, but as a very strong re-enforcement of the principle. The courts are positively enjoined to actively strive to find a Convention-compatible interpretation. The

⁴⁴³ Cross, *op. cit.*, *supra*, note 433, at p. 166.

⁴⁴⁴ *Regina v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 A.C. 155.

fact that this strong adjuration emanates from Parliament itself helps to cast away judicial inhibitions often occasioned by concerns about the need to ensure that parliamentary sovereignty is respected. Thus, as will be seen in the next chapter, the courts are able to ignore parliamentary intention in an Act of Parliament if that were necessary to protect the Convention rights.

Be that as it may, the principle of legality continues to have relevance despite the coming into effect of section 3(1) of the 1998 Act. As has been pointed out earlier, the interpretative principle embodied in section 3(1) can be applied only in the context of the Convention rights domesticated by the 1998 Act. Its application is therefore subject to the requirements of the Act itself. Under section 7(1) of the 1998 Act, “sufficient interest” is stringently defined such that only a victim of a breach of the Convention rights, or at least a potential victim thereof, can apply for judicial review under the Act. Therefore, no matter the degree of interest a person may have, if he is not a victim, or a potential victim, he would not be able to call in aid the interpretative principle embodied in section 3(1) of the Act. This situation is possible with bodies like the Equality and Human Rights Commission and Non-Governmental Organisations (NGOs) who may have sufficient interest in a matter, but may be short of being a victim of an alleged breach of the Convention rights.

On the other hand, the scope of application of the common law principle of legality is much wider and its application is not subject to any specific statutory limitation. The requirement of standing under the common law is simply “sufficient interest”, no more, no less. Therefore, a potential applicant who has sufficient interest in a matter but is unable to establish the victim requirement under section 7(3) of the 1998 Act, may rely the principle of legality in seeking to protect fundamental rights.

Section 4 of the Act provides for the making of a declaration of incompatibility. By section 4(1) and (2), where a court finds that a provision of primary legislation is incompatible with the Convention rights, and that provision could not be interpreted compatibly with the Convention rights under section 3(1) of the Act, the court “may” make a formal declaration of incompatibility. The use of the word, “may”, in section 4(2), indicates that the making of a declaration of incompatibility is discretionary and not at all mandatory. However, it is hard to imagine a situation where, having found that a provision in primary legislation is incompatible, and a section 3(1) interpretation is impossible in the circumstances of the case, the court also finds a declaration of incompatibility unnecessary. In other words, it would seem that in every case where a court finds a provision of primary legislation incompatible, and it could not interpret the provision compatibly with the Convention rights under section 3(1), the only other option open to it would be to make a declaration of incompatibility under section 4. Section 3(1) interpretations and section 4 declarations are the two major means by which the Convention rights are to be enforced under the 1998 Act. The idea that a declaration of incompatibility should be discretionary seems to equate this statutory relief with an equitable one such as an injunctive relief. It is submitted that this is wrong. While factors such as the conduct of the applicant might influence the making of an equitable relief one way or the other, it is difficult to imagine how the applicant’s conduct could be relevant to the decision whether to make a formal declaration of incompatibility under section 4(2), since, it has to be admitted, the main purpose of the declaration is to draw the attention of the executive and Parliament to the incompatibility so that remedial measures could be taken.

The power to make a declaration of incompatibility is restricted to the superior courts listed in section 4(5) of the Act, namely, the House of Lords, the Judicial Committee of the Privy Council, the Courts-Martial Appeal Court, in Scotland, the High Court of Justiciary sitting otherwise as a trial court or the Court of Session, and in England and Wales, or Northern

Ireland, the High Court or the Court of Appeal. A probable reason for restricting the power to make declarations of incompatibility to these courts only may be the desire to reduce the number of cases in which the Crown may be required, under section 5 of the Act, to be joined in legal proceedings. While this might save costs for the Crown, it could lead to more avoidable appeals being made from inferior courts to the superior courts, where the sole purpose might be to secure a formal declaration that could have been made by the inferior courts were they not statutorily prevented from making it.

By section 4(6)(a) of the Act, a declaration of incompatibility “does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given”, and by section 4(6)(b), such a declaration “is not binding on the parties to the proceedings in which it is made.”

Section 4(6) is apparently intended to preserve parliamentary sovereignty. By enacting that a statutory provision judicially declared incompatible will continue to be in force, Parliament had made it clear that its sovereign will prevails over the Convention rights. A section 4 declaration of incompatibility is meant to set in motion ministerial (and ultimately parliamentary) remedial action under section 10 and Schedule 2 of the Act.

In terms of effectiveness as a means of enforcing the Convention rights, there is a marked difference between section 3(1) interpretations and section 4 declarations. A section 3(1) interpretation could be equivalent to a judicial amendment of the offending statutory provision.⁴⁴⁵ By it, the court could immediately remedy the breach by interpreting the

⁴⁴⁵ In situations where section 3(1) interpretation might involve a substantial alteration of the legal effect of the offending statutory provision, it is conceivable that the Government would prefer a declaration of incompatibility, thus enabling the Government and ultimately, Parliament, to take the decision to amend, rather than the court effecting the amendment by itself. For example, in *Attorney General's Reference (No. 4 of 2002)* [2004] UKHL 43; [2005] 1 AC 264, the Attorney General urged the House of Lords to make a declaration of incompatibility under section 4 of the 1998 Act if it found the statutory provision under consideration to be

provision in a way that complies with the Convention rights. The practical effect would often be that, henceforth, the statutory provision would operate, or be enforced as if amended by the judgment of the court. No further legislative or executive measure would be required for the victor to enjoy the benefits of the judgment. And the fact that the resultant interpretation under section 3(1) is binding on the parties to the proceedings makes it even more effective as a means of enforcing the Convention rights.

On the other hand, a section 4 declaration relies for its effectiveness, on the cooperation of the responsible minister, and ultimately, Parliament. Its value as a judicial remedy is limited to putting political pressure on the Government and Parliament to amend the offending legislation for the purpose of complying with the Convention rights. An applicant who succeeds in obtaining a declaration of incompatibility gets no immediate benefit in terms of vindicating his Convention rights; as a matter of fact, there is no legal guarantee that he would have his Convention rights vindicated as a result of the declaration.⁴⁴⁶ Thus, Ian Leigh and Laurence Lustgarten⁴⁴⁷ have stated that a declaration of incompatibility “is

incompatible with the Convention rights, rather than make a section 3(1) interpretation of the provision, which might, expectedly, effect a change in the legal effect of the provision. A similar plea was made by the relevant Government Department in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2001] 3 WLR 183. As has been noted by Dominic McGoldrick, Government “preference... for clear legislative change” of statutory law might be the reason for such pleas: McGoldrick, D. (2001). “The United Kingdom's Human Rights Act 1998 in Theory and Practice.” International and Comparative Law Quarterly **50(4)**: 901 - 953.

⁴⁴⁶ Dominic McGoldrick has highlighted a serious problem this could cause in criminal cases. While a declaration of incompatibility might render a criminal conviction unsafe, because it is not binding on the parties, it might well be that the conviction would nevertheless stand; *op.cit.*, note 445.

Similar problems may arise in detention cases. See for example, *A and others v Secretary of State for the Home Department; X and others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169, where the House of Lords, pursuant to section 4 of the 1998 Act, declared section 23 of the Anti-terrorism, Crime and Security Act 2001, which authorised the detention of the applicants, incompatible with the Convention rights. The applicants remained in detention long after the declaration was made. If the section were interpreted under section 3(1), in a manner that complied with the Convention rights, such an interpretation could have been binding on the Secretary of State and he would have been legally obliged to release the detainees.

⁴⁴⁷ Leigh, I. and L. Lustgarten (1999). “Making Rights Real: The Courts, Remedies, and the Human Rights Act.” Cambridge Law Journal **58(3)**: 509 - 545.

fundamentally inconsistent with the idea of vindicating individual rights, and it exacts a price: a litigant who has in a formal sense won a case is left empty-handed.”⁴⁴⁸

This difference in effectiveness between section 3(1) interpretations and section 4 declarations might be responsible for many commentators holding a radical view of section 3(1). They perceive it as the primary means by which the Convention rights are to be delivered. Thus, courts must make resourceful use of the interpretative obligation and strive to find a Convention-compatible meaning irrespective of the language used in the statutory provision. To such commentators, declarations of incompatibility should rarely be resorted to. It is submitted that this approach to the relationship between section 3(1) and section 4 is not borne out of the express provisions of the 1998 Act and does not take account of the fact that bringing rights home, as the Government put it, was meant to be a collective effort by all arms of Government, namely, the executive, the legislature and the judiciary, each playing a part proportionate to its constitutional role within the framework of the unwritten British Constitution, which is underlined by the doctrine of parliamentary sovereignty.

As evident from the White Paper preceding the introduction of the Human Rights Bill into Parliament⁴⁴⁹, and from the 1998 Act itself,⁴⁵⁰ the model of rights protection which Parliament has chosen is one of democratic dialogue amongst the three main institutions of State, namely, Parliament, the executive and the judiciary.

⁴⁴⁸ Ibid, at pp. 537-538. This writer would not go as far as saying that such a litigant would be left “empty-handed.” The pressure brought to bear on the Government (especially in high profile cases) by a judicial declaration that a statutory provision is incompatible, could be quite considerable.

⁴⁴⁹ *op.cit.*, supra, note 366.

⁴⁵⁰ See Appendix 3.

Democratic dialogue is said to occur “if judicial decision is open to legislative reversal, modification or avoidance.”⁴⁵¹ A good example of a democratic dialogue model of rights protection is the Canadian Charter of Rights and Freedoms mentioned earlier. As would be recalled, while the courts are given a general power to override legislative enactments on grounds of breach of the rights protected by the Charter, section 33(1) and (2) of the Charter reserves to the legislature power to make laws contrary to the rights if this intention is expressly stated in the enactment concerned. Thus, a judicial nullification of a piece of legislation can be overturned by the legislature simply by re-enacting the legislation with a provision that it is to apply notwithstanding any conflict with the rights protected under the Charter.

The democratic dialogue model of rights protection under the Canadian Charter is not exactly the same as that under the British Human Rights Act 1998, but they share some similarity. Under the 1998 Act, unlike the Canadian Charter, courts do not have the power to strike down incompatible legislation. They can only interpret the legislation under section 3(1) in a manner compatible with the Convention rights if this is possible, otherwise a declaration of incompatibility is to be made under section 4 of the Act. However, the power of interpretation derived from section 3(1) can have the capacity, as will be seen in the next chapter, to substantially change the legal effect of legislative provisions such that the original provisions as enacted by Parliament become ineffective for all practical purposes. In substance, though not in language, this has similar effect as a judicial nullification of the original, offensive provisions.

⁴⁵¹ Per Hogg and Bushell, quoted in Young, A. L. (2009). Parliamentary Sovereignty and the Human Rights Act. Oxford, Hart Publishing.
at p. 116.

In the above context, democratic dialogue models of rights protection can be seen in contrast with constitutionally entrenched rights protection whereby the courts are empowered to strike down legislation for being incompatible with the constitutionally protected rights, and the legislature cannot reverse judicial decisions vindicating those rights. This is the case in the United States and Nigeria.

The 1998 Act provides, as Young puts it, “a legal mechanism for interaction between the judiciary and legislature.”⁴⁵² The main facilitators of this inter-institutional dialogue are sections 3 and 4.

Section 3 of the Act, as has been explained above, appears to be the principal mechanism by which the Convention rights are to be protected by the domestic courts. However, as stated earlier, the section does not give to the courts the power to invalidate parliamentary enactments. The court can only use their interpretative powers as resourcefully as possible so that incompatible legislation could be interpreted and given effect in a way that is consistent with the Convention rights. As will be seen in the next chapter, the courts’ use of their interpretative powers is increasingly becoming extremely resourceful such that they feel able to cast away concerns about breaching the doctrine of parliamentary sovereignty in their effort to effectively protect the Convention rights. Thus, in many cases, by use of section 3(1) of the 1998 Act, the courts are able to substantially modify the legal effect of legislation which they determine to be incompatible with the Convention rights. However, because Parliament reserves the power to reverse such judicial decisions, the resultant interpretation continues to have effect only as far as Parliament allows it. As Lord Steyn succinctly states in

⁴⁵² Ibid, at p. 117.

*Ghaidan v Mendoza*⁴⁵³, a case in which the House of Lords made an extremely resourceful use of section 3(1), “if Parliament disagrees with an interpretation by the courts under s. 3(1), it is free to override it by amending the legislation and expressly reinstating the incompatibility.” Thus, an interpretation under section 3(1), even though final and binding as regards the particular case in which it is given, can be reversed by Parliament in its general application. Section 3(1) therefore is a legal mechanism for democratic dialogue between the courts and Parliament. The courts are given as much latitude as possible to protect the Convention rights from encroachment by Parliament. On the other hand, as the democratically elected representatives of the citizenry, Parliament has the last say what values should in any particular circumstance be legally binding.

Section 4 of the 1998 Act is also part of the mechanism for dialogue amongst the institutions of State. As stated earlier, a declaration of incompatibility under this section does not amount to a nullification of the offending legislative provision. Its intended purpose is to call the attention of the executive and Parliament to the incompatibility so that remedial action might be taken under section 10 of the Act. Thus, section 4 and 10 make it possible for all the institutions of State, the judiciary, the executive and Parliament, to partake in what is essentially a joint enterprise to protect the Convention rights.

The principal reason for the preference for a democratic model of rights protection might be that it is undemocratic for the unelected judges to be given the power to strike down on legislation enacted by the democratically elected representatives of the people. Legally binding values, no matter how fundamental they are, must, ultimately, be left to the elected legislature. This is what one might call the democratic argument for a democratic dialogue

⁴⁵³ [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 All ER 411; see paragraph 43 of the judgment.

model of rights protection. It preserves democracy while at the same time protecting as much as possible fundamental rights of the individual.

However, on analysis, the constitutionally entrenched model of rights protection may not be any less democratic. This is because the constitution itself, which contains both the entrenched rights as well as the judicial power to review and strike down offending legislation, can have democratic legitimacy if it emerges from a democratic process such as a referendum, as is usually the case. Further, even entrenched provisions in a constitution are usually open to amendment by legislative authorities, even if cumbersome. On the other hand, one important advantage which the constitutionally entrenched model of rights protection has over the democratic dialogue model is that the former may have a greater capacity to protect minority rights from being violated by the majority.

It would appear therefore, that the overriding reason, at least in the United Kingdom, for the preference for a democratic dialogue model of rights protection is that it has no adverse implications for parliamentary sovereignty. In view of the constraints imposed by the doctrine of parliamentary sovereignty, courts could not be given the power to set aside offending parliamentary enactments. This much was stated in the White Paper preceding the introduction of the Human Rights Bill into Parliament.⁴⁵⁴ Therefore, the best viable option seemed to be a model that enabled the courts to protect the Convention rights as much as they possibly can while preserving to Parliament the ultimate power to deliberately make laws notwithstanding any breach of the Convention rights.

⁴⁵⁴ *op.cit.*, *supra*, note 366.

In the context of the 1998 Act, democratic dialogue aims to balance the competing values of democracy and the Convention rights. Each institution of State has to take a balanced view of their respective duties and powers if the delicate balance between democracy and the Convention rights is to be achieved. The judiciary must show due deference to the legislature and the executive on issues where the Convention has granted to the Contracting States a discretionary area of judgment. This is especially required where the matter in question involves policy issues which can only be effectively dealt with after wide consultations and exhaustive parliamentary debates.

On the other hand, Parliament must respect judicial decisions in areas where the courts traditionally have special expertise. Therefore, on issues which come within the traditional sphere of the courts, such as issues of fair hearing and access to court, Parliament should not intervene and reverse judicial vindications thereof.

As Young observed⁴⁵⁵, a democratic dialogue model of rights protection can only be justified if it is capable of delineating a middle ground between rights protection and democracy so that the one does not overwhelm the other. The 1998 Act does not contain a clearly expressed delineation. Therefore, its success as a model of rights protection depends, as have been stated, on each institution taking a balanced view as they dialogue amongst themselves. In dealing with the Convention rights, each institution of State must impose a certain level of self-restraint in relation to the other as may be appropriate having regard to the context of each case.

⁴⁵⁵ Young, A. L. (2009). Parliamentary Sovereignty and the Human Rights Act. Oxford, Hart Publishing. at p. 121.

It seems clear from a reading of the provisions of section 3(1) and section 4, and also from the case law on the 1998 Act which will be examined in the next chapter, that a section 3(1) interpretation affords a stronger protection of the Convention rights than a section 4 declaration of incompatibility. This is because, as Young quite rightly stated, “.... To interpret a statute in a manner compatible with a Convention right ensures that the Convention right is legally protected.”⁴⁵⁶ On the other hand, as has been stated earlier, a section 4 declaration gives the applicant no legally enforceable victory. A declaration under that section amounts to no more than an advisory opinion that the statutory provision in question is incompatible with the Convention rights. The executive, and ultimately, Parliament, is thereby notified of the incompatibility. The ultimate decision to modify the offending statutory provision is Parliament’s to take. And in this, it has absolute discretion because one of the main themes that permeate the 1998 Act is that parliamentary sovereignty is left untouched. Therefore, as Young observed⁴⁵⁷, “those preferring a model of parliamentary sovereignty advocate a more restrictive role for the courts,” preferring less use of section 3(1) interpretation and more use of section 4 declarations, thereby allowing Parliament, rather than the judges, to set legally binding norms. Conversely, those who advocate some form of constitutional sovereignty, where courts would be able to exercise greater authority to fully protect the Convention rights from parliamentary encroachment prefer more use of section 3(1) interpretation and less use of section 4 declarations.

Thus, the interplay between section 3(1) interpretation and section 4 declarations has been described by Danny Nicol as “the judge’s dilemma.”⁴⁵⁸ It is respectfully submitted that this

⁴⁵⁶ Young, A. L. (2005). "A Peculiarly British Protection of Human Rights?" Modern Law Review **68**(5): 858-872, at p. 862.

⁴⁵⁷ Ibid, at p. 858.

⁴⁵⁸ Nicol, D. (2004). "Statutory Interpretation and Human Rights after *Anderson*." Public Law: 274-282, at p. 274.

characterisation gives the wrong impression that notwithstanding the peculiar contextual background to a case at hand, judges are constrained to simply choose between one of the two “competing” provisions according to their preference for parliamentary sovereignty or constitutional sovereignty, as the case may be. Not surprisingly, the decision in *R v A (No.2)*⁴⁵⁹ (examined in the next chapter), a case in which the House of Lords made an extremely resourceful use of section 3(1) interpretation, was seen by Nicol as a victory of section 3(1) over section 4; and *Re S (Minors) (Care Order: Implementation of Care Plan)*; *Re W (Minors) (Care Order: Adequacy of Care Plan) (co-joined appeals)*⁴⁶⁰, *R (on the application of Anderson) v Secretary of State for the Home Department*⁴⁶¹, and *Bellinger v Bellinger*⁴⁶² cases (all examined in the next chapter) in which the House of Lords declined to use section 3(1) to modify seemingly incompatible legislative provisions, were interpreted in terms of the judiciary resiling from its previous acceptance of section 3(1) as the correct approach to human rights adjudication under the 1998 Act.⁴⁶³

Aileen Kavanagh⁴⁶⁴ disagrees with the view indicated above, arguing that “it is the context and individual circumstances of the case which explains the difference of judicial approach, rather than any fundamental change of mind about the possibilities of s. 3(1).” It is submitted that this is a more preferable view than that of Nicol. As will be seen in the next chapter, a number of factors may account for a court declining to use its power of interpretation under section 3(1) in a particular case even though it might have been possible in principle to modify the offending statutory provision concerned. For example, in *Re S*, it was not possible to identify the particular provision in the Children Act 1989 that the court could have

⁴⁵⁹ [2001]UKHL 25; [2002] 1 AC 45; [2001] 3 All ER 1

⁴⁶⁰ [2002] UKHL 10; [2002] 2 AC 291

⁴⁶¹ [2002] UKHL 46; [2002] 4 All ER 1089

⁴⁶² [2003] UKHL 21; [2003] 2 AC 467

⁴⁶³ Nicol, *op.cit.*, *supra*, note 458.

⁴⁶⁴ Kavanagh, A. (2004). "Statutory Interpretation and Human Rights after *Anderson*: a more contextual approach." *Public Law*: 537-545, at p. 537..

modified by way of section 3(1) interpretation. Therefore, even though the Children Act, taken as a whole, might have the potential of contravening the Convention rights, a court could not remedy any incompatibility without re-writing a substantial part of the statute with far-reaching practical ramifications for executive bodies in terms of new procedures and resources. A judicial attempt to do so would very likely cross the border between interpretation and legislation. On the other hand, no such circumstances arose in *R v A*.

To confirm that the House of Lords, in deciding *Re S* and *Anderson* the way they did, did not resile, as suggested by Nicol, from further use of section 3(1) interpretation, their Lordships' decision in the subsequent cases of *Ghaidan v Mendoza*⁴⁶⁵ and *Secretary of State for the Home Department (Respondent) v MB (FC) (Appellant); Secretary of State for the Home Department (Respondent) v AF (FC) (Appellant); Secretary of State for the Home Department (Appellant) v AF (FC) (Respondent) (conjoined appeals)*⁴⁶⁶ (examined in the next chapter) indicated that in appropriate cases, the courts would continue to protect the Convention rights by use of their interpretative powers under section 3(1). As will be seen in the next chapter, the House, similar to what happened in *R v A*, made highly resourceful use of section 3(1) in order to bring the offending statutory provisions in line with the Convention rights.

It is clear from the case law, which is dealt with in the next chapter, that while it may sometimes be theoretically possible to modify primary legislation by use of section 3(1) interpretation, the court might nevertheless find it undesirable or inappropriate to do so, having regard to the peculiar facts and circumstances of the case at hand.

⁴⁶⁵ [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 All ER 411

⁴⁶⁶ [2007] UKHL 46

Section 6 of the 1998 Act continues the notion of giving further effect to the Convention rights while simultaneously seeking to preserve parliamentary sovereignty. The section, while apparently aiming to instill a culture of respect for the Convention rights by forbidding public authorities to act in a way that is incompatible with the Convention rights, also preserves parliamentary sovereignty and the principle of parliamentary privilege.

By section 6(1), “it is unlawful for a public authority to act in a way which is incompatible with a Conventional right.” Under section 6(3) a public authority refers to courts and tribunals⁴⁶⁷ and “any person or authority certain of whose functions are of a public nature.”⁴⁶⁸ This latter provision in section 6(3)(b) is apparently intended to make it clear that apart from the ordinary public authorities such as Ministers, government departments and agencies, the police and the armed forces, etc, any person who, though not ordinarily a public officer or body, perform some public functions, would be subject to section 6(1) as far as those public functions affect the Convention rights. Thus, a private security firm, though not a public body in the ordinary sense of the term, would be subject to section 6(1) if it is given contractual duties to maintain or secure government prison facilities.

The inclusion of courts and tribunals within the definition of a public authority means that in performing their judicial functions, judges are under an obligation, just as other public bodies are, to ensure that the Convention rights are complied with in the way they make their decisions.

It is noteworthy that section 6(3) expressly excludes the Houses of Parliament “or a person exercising functions in connection with proceedings in Parliament” from the definition of a

⁴⁶⁷ Section 6(3)(a)

⁴⁶⁸ Section 6(3)(b)

public authority. What this means is that the subsection protects the acts of either Houses of Parliament from judicial intervention. Apparently, this protection would extend to ministerial functions if they are performed “in connection with proceedings in Parliament.” However, it must be made clear that ministerial functions derived from primary legislation can have no protection under the last-mentioned provision as such functions cannot generally be regarded as functions “in connection with proceedings in Parliament.”

Apparently, the exclusion of the Houses of Parliament from the category of public authorities is a statutory recognition of the doctrine of parliamentary sovereignty as well as the principle of parliamentary privilege, and an indication that courts are meant to respect parliamentary enactments even where they infringe on the Convention rights, if the enactments concerned cannot be interpreted in accordance with section 3(1) of the 1998 Act.

While section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights, section 6(2)(a) and (b) provide possible defences to allegations of unlawfulness brought under section 6(1). First, under section 6(2)(a), section 6(1) would not apply if “as a result of one or more provisions of primary legislation, the authority could not have acted differently.” This defence applies if the public authority was required to act the way it did so that a statutory duty imposed on it is complied with. In *R (on the application of Hooper) v Secretary of State for Works and Pensions*⁴⁶⁹, the claimants who were widowers challenged the Secretary of State’s decision not to pay them benefits which would have been payable to widows under sections 36 and 38 of the Social Security Contributions and Benefits Act 1992 as being discriminatory under Article 14 of the Convention read in conjunction with Article 1 of the First Protocol, and therefore unlawful

⁴⁶⁹ [2005] UKHL 29; [2005] 1 WLR 1681

under section 6(1) of the 1998 Act. The House of Lords held that since it was clear that the 1992 Act required payments to be made to widows only, it meant that the Secretary of State was under a statutory duty *not* to make equivalent payments to widowers as making such payments would “subvert the intention of Parliament.”⁴⁷⁰ Thus, the Secretary of State’s decision was excused by section 6(2)(a) of the 1998 Act. Similarly, where a public authority has no power to act otherwise than as mandated by the enabling statute, the defence under section 6(2)(a) would avail it because, as the section provides, the authority “could not have acted differently.”⁴⁷¹

Secondly, by section 6(2)(b), the public authority would equally be excused if it were mandatory that it acted the way it did so as to give effect to, or enforce the provisions of, primary legislation which could not be interpreted in accordance with section 3(1) of the 1998 Act. In other words, if a decision not to exercise the power would amount to repealing or making ineffective the statutory provision by which Parliament has clearly granted the power, then the action of the public authority would be excused.⁴⁷²

Thus, the defences available under section 6(2)(a) and (b) will generally not apply if the act concerned was discretionary in nature such that the authority could have acted differently, or could have chosen not to act at all in a particular case. In other words, the combined effect of the provisions of section 6(1) and (2) is that a public authority cannot rely on the sole fact that the act complained of was taken in exercise of discretionary powers granted under primary legislation; this by itself does not qualify as a defence since the authority would necessarily be able to exercise a discretionary power, by virtue of the very nature of such a power, either

⁴⁷⁰ Ibid, see paragraph 122 of the judgment, per Lord Brown

⁴⁷¹ See *R (on the application of Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30; [2006] 1 All ER 529

⁴⁷² See *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295. See also *R v Kansal (No.2)* [2001] UKHL 62; [2002] a AC 295

to act differently, or to chose not to act at all, if Convention rights are likely to be breached in the circumstances of the particular case.

Thus, the nature of the defences in section 6(2)(a) and (b), read in conjunction with section 6(1) and the courts' interpretative obligation in section 3(1), indicates quite clearly that with the coming into operation of the 1998 Act, discretionary powers granted to the executive are subject not only to the relevant enabling statutes by virtue of which those powers are exercised, but also to relevant provisions of the 1998 Act. This is because section 6(1) makes it "unlawful" for a public authority to act contrary to the Convention rights. Therefore, apart from ensuring that discretionary powers are duly exercised within the confines of the enabling statute, courts must ensure that they are also exercised in a manner that leaves untouched the Convention rights. In this respect, the courts' interpretative power under section 3(1) of the 1998 Act can be utilized to read into the enabling statutory provision an implied provision that the discretionary powers granted thereby are to be exercised without prejudice to the Convention rights of persons affected.⁴⁷³ Therefore, discretionary powers exercised in a manner that contravenes the Convention rights will be regarded by the courts as unlawful and *ultra vires*.⁴⁷⁴

Before the 1998 Act came into existence, the basis of judicial review of discretionary powers was the common law. Under that regime, the focus of the courts, when reviewing the exercise of a discretionary power, was the power itself, examined against the enabling statute under which the discretionary power was exercised. The court's duty was to ensure that

⁴⁷³ Elliott, M. (2001). "The Human Rights Act and the Standard of Substantive Review." Cambridge Law Journal **60**: 301, at p. 333.

⁴⁷⁴ Jack Beatson; Stephen Grosz; Tom Hickman (2008). Human Rights: Judicial Protection In The United Kingdom. London, Sweet & Maxwell, at p. 537, paragraph 6 - 05.

discretionary powers were exercised subject to a duty not to exceed the powers granted by the enabling statute, and that the public body concerned acted rationally and fairly.⁴⁷⁵ So far as the enabling statute was clear and unambiguous, the courts could not review the statute itself. Thus, subject to the principle of legality, if a public body acted within the confines of the enabling statute in a rational and fair manner, its actions could not be regarded as unlawful or *ultra vires* merely because fundamental rights were breached. The courts emphasized that it was not part of their judicial functions to review the merits of the executive discretionary decision being challenged.

However, under the 1998 Act, when reviewing discretionary powers, the primary focus is on the Convention rights; the court's duty is to ensure that the Convention rights are left intact. As has been quite rightly stated, "... an inevitable and intended effect of section 6(1) is to transform discretionary powers into duties to act or not to act where this is required to ensure compatibility with the Convention."⁴⁷⁶ In other words, where the exercise of a discretionary power would breach the Convention rights in a particular case, the 1998 Act imposes a duty on the public authority concerned to make an exception in that case so that the Convention rights are not breached.

The standard of review, or the degree of scrutiny exerted on discretionary powers granted to the executive differ under the two regimes, i.e. the common law and the 1998 Act. The standard of review under the common law is *Wednesbury* unreasonableness developed by Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.⁴⁷⁷ In

⁴⁷⁵ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 K.B. 223 at 228-230.

⁴⁷⁶ Jack Beatson et al, op. cit., supra, note 474, at p. 545, paragraph 6 - 23.

⁴⁷⁷ [1948] 1 K.B. 223

Council of Civil Service Unions v Minister of State for Civil Service (the *GCHQ* case)⁴⁷⁸, Lord Diplock characterized this as irrationality “so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.” In *Smith and Grady v United Kingdom*,⁴⁷⁹ a case in which the United Kingdom domestic courts had applied a “heightened scrutiny” form of *Wednesbury* unreasonableness, (or irrationality), where the threshold by which executive discretionary actions may be held unreasonable was much lowered than it used to, the European Court nevertheless indicated clearly that the *Wednesbury* standard, (whether in its traditional form or its “heightened scrutiny” form) did not afford an effective degree of judicial scrutiny of discretionary powers that interfered with an individual’s Convention rights. The Court stated:

“The threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants’ rights answered a pressing need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court’s analysis of complaints under article 8 of the Convention.”⁴⁸⁰

The implication of the above statement is that where Convention rights are involved, it would not be sufficient for the United Kingdom courts to review the exercise of executive discretionary powers on the basis of *Wednesbury* unreasonableness only. The courts must go beyond that. They must apply principles of proportionality in order to determine the compatibility of the discretionary action with the Convention rights.

⁴⁷⁸ [1985]AC 374

⁴⁷⁹ [1999] 29 EHRR 493

⁴⁸⁰ Ibid, at p. 543, paragraph 138.

It seems to have now been recognised even by the domestic courts that judicial scrutiny of discretionary powers by *Wednesbury* standards may not always afford adequate protection of the Convention rights, for, as observed by Lord Cooke in *Regina (Daly) v Secretary of State for the Home Department*⁴⁸¹, “only a very extreme degree (of unreasonableness) can bring an administrative decision within the legitimate scope of judicial invalidation.”

It would appear that to satisfy the requirement in Article 13 of the Convention to provide an effective remedy for a breach of the Convention rights, discretionary powers granted executive bodies have to be subjected to the proportionality test formulated by the European Court, if traditional *Wednesbury* unreasonableness would not provide an effective remedy. Thus, in *Daly’s case*⁴⁸², even though the House of Lords decided the case on the “orthodox domestic approach to judicial review,”⁴⁸³ there were indications, particularly from the statement of Lord Steyn, that had it been necessary, the House would have had to review the executive decision concerned by considering not only the question whether the executive decision was authorised by its enabling statute, and that it was reasonable in the *Wednesbury* sense, but also whether the interference with the Convention right of the applicant was justified in the sense that it had a legitimate public objective, and that the degree of interference was not greater than was necessary to achieve the legitimate objective.⁴⁸⁴ If the curtailment of a Convention right has no legitimate purpose, no discretionary decision can be allowed to breach the Convention rights. Even if the court finds that the curtailment has a legitimate objective, it still has to assess whether the curtailment is greater than is necessary to achieve the objective. If the answer is in the negative, then the decision is liable to be quashed. In cases calling for a balance to be struck between competing interests, usually, the

⁴⁸¹ [2001] 2 AC 532, at p. 549, paragraph 32 of the judgment.

⁴⁸² [2001] 2 AC 532

⁴⁸³ Per Lord Bingham, *ibid*, at p. 545, paragraph 23 of the judgment.

⁴⁸⁴ *Ibid*. See statement of Lord Steyn at p. 546, paragraphs 26-28 of the judgment.

interests of the State and the general public on the one hand, and the Convention rights of the individual on the other hand, it is for the court to determine for itself the appropriate balance.

Because the application of the proportionality test involves a much more intensive scrutiny and may, as Lord Steyn observed, “require the reviewing court to assess the balance which the decision maker has struck”⁴⁸⁵, there are concerns as to whether this means that courts are thereby empowered to review the merits of the executive decision being challenged, something the courts have declined to do in the traditional approach to judicial review of the exercise of discretionary powers. However, Lord Steyn gave assurance that the application of the proportionality test “does not mean a shift to merits review.”⁴⁸⁶ This view was confirmed by Lord Bingham in *Huang v Secretary of State for the Home Department; Abu-Qulbain v Secretary of State for the Home Department; Kashmiri v Secretary of State for the Home Department* (conjoined appeals)⁴⁸⁷

It is submitted that despite these assurances, the application of the proportionality test sits uncomfortably with the notion that courts are not to review the merits of the decision as taken by the decision maker. An investigation of the question whether the decision had a legitimate purpose, and that the extent of encroachment on the Convention rights was no more than necessary to achieve the purpose, would likely require, at least to some degree, a review of the discretionary decision itself. This appears to be all the more so when the court has to determine the appropriate balance between the rights of the individual on the one hand, and the interests of the State and the society on the other hand, in order to determine the compatibility of the decision with the Convention right concerned. Probably the best

⁴⁸⁵ Ibid, p. 547, paragraph 27 of the judgment.

⁴⁸⁶ Ibid, p. 548, paragraph 28 of the judgment.

⁴⁸⁷ [2007] UKHL 11; [2007] 2 A.C 167; [2007] 2 WLR 581; [2007] 4 All E.R. 15. See paragraph 13 of his Lordship’s judgment.

understanding of the above judicial assurances would be that in reviewing discretionary powers, courts must not totally assume the position of the decision maker. The courts must give due regard to the doctrine of the Separation of Powers and recognise that administrative decisions are traditionally within the scope of authority of the executive arm. Therefore, due deference must be accorded to such decisions, and any discretions allowed to domestic legislative and executive authorities by the Convention must be properly taken into account by the courts.

To reiterate, the combined effect of sections 3(1) and 6(1) is that all executive discretionary powers granted by Parliament are now to be exercised subject to the implied provision that the Convention rights are left untouched.

When a court makes a declaration of incompatibility under section 4 of the 1998 Act, in effect, it passes the matter to the appropriate Minister of the Crown who may, under section 10 of the Act, proceed to amend the offending statutory provision to cure the incompatibility. Section 10(2) enables the Minister to amend even primary legislation by order,⁴⁸⁸ if this were necessary to remove the incompatibility. This avoids the cumbersome and often drawn-out process of amending the offending provision by the passage of an Act of Parliament. Section 10(2) indicates that despite a declaration of incompatibility by a court, the Minister retains discretion to decide whether to proceed to amend the incompatible legislation or not. The provision in section 10(2) is to the effect that the Minister “**may**”⁴⁸⁹ make the amendment if he considers that there are “compelling reasons” for doing so. A judgment of a competent court of law in the United Kingdom, which takes into account the jurisprudence of the European Court in making a declaration of incompatibility, would likely constitute a

⁴⁸⁸ Otherwise known as “Henry VIII Power”

⁴⁸⁹ Bold type supplied for emphasis.

“compelling reason” for the responsible Minister to proceed to amend the legislation in question. However, the Minister’s consideration of what amounts to a compelling reason would not be subject to judicial review. Hence, the full effectiveness of section 4 declarations depends in large measure on the cooperation of the Minister and Parliament.

While Henry VIII powers are granted to the responsible Minister enabling him to amend primary legislation,⁴⁹⁰ prior parliamentary approval⁴⁹¹ would normally be required in accordance with paragraph 2(a) of Schedule 2 to the 1998 Act. For urgent cases coming under paragraph 2(b) of Schedule 2, subsequent parliamentary approval would be necessary for the remedial order to continue in force beyond a period of 120 days beginning from the day the order was made.⁴⁹² This requirement of parliamentary approval enables Parliament to participate in the remedial process initiated by the court.

To complete the notion of giving further effect to the Convention rights, section 19(1) of the 1998 Act, which deals with ministerial statements of compatibility, requires the responsible Minister in charge of a Bill in either House of Parliament, when introducing the Bill, to

“(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or
(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.”

⁴⁹⁰ See section 10(2) of the 1998 Act and paragraph 1 of Schedule 2 to the Act.

⁴⁹¹ By way of a resolution of each House of Parliament

⁴⁹² See paragraph 4(4) of Schedule 2 to the 1998 Act.

Section 19(2) requires the statement to be in writing. The statement has to be made before the Second Reading of every Bill in each House of Parliament. Thus, for example, where a Bill has been passed in the House of Commons before it is introduced in the House of Lords, the appropriate Minister of Government in the House of Lords would have to make another statement in accordance with section 19 before the Second Reading of the Bill in the House of Lords. The statement in the House of Lords would have to take into account any amendments that might have been made to the Bill during debates in the House of Commons.⁴⁹³ The required statement is usually made on the face of the Bill, and the Explanatory Notes which now accompany Bills contain a brief reference to the ministerial statement made pursuant to section 19(1).⁴⁹⁴

Obviously, section 19 statements apply to all primary legislation without exception, but only to primary legislation and not to subsidiary legislation. This is because the section refers to Bills only. Consequently, there is no statutory obligation to make a section 19(1) statement in a draft statutory instrument or other subsidiary legislation taken before Parliament for approval. However, the Government has urged Ministers to make statements similar to those required by section 19(1). In particular, Ministers have been requested to always make such statements where the proposed subsidiary legislation would have the effect of amending primary legislation.⁴⁹⁵

The aim of the requirement to make a statement under section 19(1) seems to be to forewarn Members of Parliament of probable Convention-rights implications of the Bill, thus

⁴⁹³ See *The Human Rights Act 1998 Guidance for Departments*, 2nd edition, Home Office, Annex A, paragraph 2, at www.nationalarchives.gov.uk

⁴⁹⁴ Ibid, at paragraph 6.

⁴⁹⁵ *The Human Rights Act 1998 Guidance for Departments*, 2nd edition, Home Office, paragraph 40, at www.nationalarchives.gov.uk

generating vigorous debates where there might be a likely infringement of the Convention rights.⁴⁹⁶

It has to be noted that the requirements under section 19 apply only to ministers of the Government who introduce Government-sponsored Bills into Parliament. It follows therefore that a Member of Parliament who introduces a Private Member's Bill would be under no obligation to make compatibility statements under the section. Considering the expected objective of section 19, which is to draw the attention of members of Parliament to Convention issues that may likely arise in the Bill being introduced, there appears to be no reasonable grounds for not extending the requirements contained in the section to members of Parliament who introduce Private Member's Bill. Ostensibly to mitigate this apparent shortcoming, whenever a Private Member's Bill is directly assisted by the Government (i.e., "a Government handout"), the Minister of the Government department responsible for the policy covered by the Bill is now expected, as a matter of good practice, to express the Government's views on the compatibility of the proposed legislative provisions with the Convention rights during the Second Reading of the Bill.⁴⁹⁷

It would appear that a simple statement reflecting the wording of section 19(1)(a) or (b) would be sufficient to meet the requirements therein contained. The Minister making the statement is under no statutory obligation to state the reasons why he thinks the provisions of the Bill would be compatible with the Convention rights, or why he is unable to make a statement of compatibility. In practice, ministerial statements have been quite brief and

⁴⁹⁶ See Bamforth, N. (1998). "Parliamentary Sovereignty and the Human Rights Act 1998." Public Law(Winter): 572-582.

⁴⁹⁷ *The Human Rights Act 1998 Guidance for Departments*, 2nd edition, Home Office, paragraph 38, at www.nationalarchives.gov.uk

straight-forward. Usually, no reasons are disclosed. The standard form of the statement under section 19(1)(a), as provided in the Government's Guidance for Departments is as follows: "In my view the provisions of the ... Bill are compatible with the Convention rights." And under section 19(1)(b), the following statement suffices: "I am unable to make a statement that in my view the provisions of the ... Bill are compatible with the Convention rights but the Government nevertheless wishes the House to proceed with the Bill."⁴⁹⁸ However, the Government has undertaken that Ministers would be ready to give a general outline of the arguments leading to the conclusions reflected in the statements which they have given pursuant to section 19(1).⁴⁹⁹ Thus, whenever a Convention issue arises during parliamentary debates, a Minister should, as much as possible, without normally compromising privileged information regarding specific legal advice, disclose the underlying reasons informing his views on issues of compatibility with the Convention rights.

While the use of the word, "must" in relation to ministerial statements in section 19 suggests that it is obligatory for the Minister to make the statement as required, it is submitted that failure to make the statement would not affect the validity of the eventual legislation; otherwise, the principle of parliamentary privilege would be breached.⁵⁰⁰

A decision to make the required ministerial statement under section 19(1)(a) means that the minister is confident in his view that the Bill is compatible with the Convention rights. He normally should obtain legal advice which would take into account the Convention rights and the jurisprudence both of the domestic courts and the European Court. At the very minimum,

⁴⁹⁸ See *The Human Rights Act 1998 Guidance for Departments*, 2nd edition, Home Office, Annex A, paragraph 3, at www.nationalarchives.gov.uk

⁴⁹⁹ *The Human Rights Act 1998 Guidance for Departments*, 2nd edition, Home Office, paragraph 39, at www.nationalarchives.gov.uk

⁵⁰⁰ See *Edinburgh and Dalkeith Railway Co. v Wauchope* [1842] VII Clark & Finnelly, 710, and *British Railways Board v Pickin* [1974] WLR 208, authorities for the proposition that irregularities in the process of legislation would not affect the validity of an Act of Parliament.

a statement under section 19(1)(a) should be made only if “it is more likely than not that the provisions of the Bill will stand up to challenge on Convention grounds.”⁵⁰¹ Thus, where the chances either way are 50-50, a minister should normally make the statement under section 19(1)(b). This is because section 19(1)(a) requires a reasonable degree of certainty concerning the Minister’s view; whereas section 19(1)(b) applies both to circumstances where the Minister thinks that the Bill would not stand up to a Convention challenge, as well as to circumstances where he is “unable” to come to a definite conclusion on the issue of compatibility, despite the presence of strong arguments in favour of the Bill being compatible.

Ministerial statements made under section 19(1)(a) have no legal effect on the question whether the resultant legislation is compatible with the Convention rights. As Lord Hope observed in *R v A*, (examined in the next chapter) such statements “are no more than expressions of opinion by the minister. They are not binding on the court, nor do they have any persuasive authority.”⁵⁰² Because of the very nature of ministerial statements under section 19(1)(a), sometimes situations occur where the court’s view on compatibility seem to differ from the view expressed by the Minister. For example, in *R v A*⁵⁰³, despite the Minister’s statement that in his view the Bill which became the Youth Justice and Criminal Evidence Act 1999 was compatible with the Convention rights, the House of Lords decided that the total denial of judicial discretion in section 41 of the Act had the capacity to offend the Convention right to a fair trial in some cases. It therefore used its interpretative power under section 3(1) of the 1998 Act to read into section 41 of the 1999 Act a proviso that ensured compatibility with the Convention rights. It has been observed that where a minister

⁵⁰¹ *The Human Rights Act 1998 Guidance for Departments*, 2nd edition, Home Office, paragraph 36, at www.nationalarchives.gov.uk

⁵⁰² [2001] UKHL 25; [2002] 1 AC 45; [2001] 3 All ER 1; at paragraph 69 of the judgment.

⁵⁰³ [2001] UKHL 25; [2002] 1 AC 45; [2001] 3 All ER 1. This case is examined in the next chapter.

makes the required statement under section 19(1)(a), and the Bill is passed in substantially the same form as it was introduced, judicial use of section 3(1) interpretation to modify the resultant statutory provisions to bring them in conformity with the Convention rights can more easily be defended as “permissible interpretation” rather than “impermissible legislation.”⁵⁰⁴

It might be suggested that a statement under section 19(1)(a) might constitute a sort of *estoppel*, preventing the Government from advancing arguments inconsistent with the Minister’s statement of compatibility in a case in which the Government is a party.⁵⁰⁵ Such a suggestion must be taken with caution. While in the interpretation of contractual documents, the statements of the parties to the contract might well be decisive of their legal rights; the same could not be said of the interpretation of statutes. Granted that a ministerial statement under section 19(1)(a) may support a presumption that the legislation was not intended to be in breach of the Convention rights, it would be inappropriate to treat it in the same way a contractual statement would likely be treated. Statutes are normally of general application. It would be inappropriate for the courts to arrive at a particular interpretation of a statutory provision in one case, and another interpretation of the same statutory provision in another case simply because the Government was a party in the first case and was not a party in the second case.

⁵⁰⁴ Jack Beatson et al, op. cit. supra, note 474, at p. 471, paragraph 5 - 28.

⁵⁰⁵ Lord Nicholls, while stating that ministerial statements could not control the meaning of an Act of Parliament, nevertheless said “unequivocal statements (which might conceivably include a statement of compatibility made under section 19(1)(a) of the 1998 Act) made by Government ministers may have another and different role, founding an estoppel against the Government.” See Nicholls, D. (2005). "My Kingdom for a Horse: The Meaning of Words." Law Quarterly Review **121**(October): 577-591.

On the other hand, ministerial statements made under section 19(1)(b) are no indication that the Government intended the resultant legislation to apply notwithstanding any incompatibility with the Convention rights. As indicated earlier, a statement under section 19(1)(b) may be made if there are reasonable doubts as to whether the provisions of the Bill would stand up to a Convention challenge. In *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*⁵⁰⁶, it appears that although the Secretary of State was of the view, having received legal advice, that the Bill which became the Communication Act 2003, and which contained a blanket prohibition of political advertising by bodies whose aim is wholly or mainly political in nature, was compatible with the Convention rights, she nevertheless made the required statement under section 19(1)(b) rather than section 19(1)(a). This seemed to have been due to an earlier decision of the European Court in *VgT Verein gegen Tierfabriken v Switzerland*⁵⁰⁷ which raised doubts as to whether the Bill could stand up to legal challenge for being incompatible with Article 10 of the Convention.⁵⁰⁸ The House of Lords cleared whatever doubts that existed when it decided that the ban, as it operated, was not incompatible with Article 10 of the Convention.

It has to be noted that the *Animal Defenders* case involved a qualified right rather than an absolute one. It was one in which Parliament was allowed a discretionary area of judgment. Where a qualified right is concerned, the fact that the ministerial statement was made under section 19(1)(b) rather than 19(1)(a) may be significant to the court's consideration of the question whether the statute is compatible with the Convention right. If the Bill was passed in substantially the same form as introduced by the minister, the court is likely to allow Parliament any discretion available to it to the fullest extent possible. This is because the judgment of Parliament on the issue on which it has legislated in full awareness of the

⁵⁰⁶ [2008] UKHL 15; [2008] 1 AC 1312.

⁵⁰⁷ [2001] 34 EHRR 159.

⁵⁰⁸ That is, the right to freedom of expression.

possibility that it might not stand up to a Convention challenge, “should not be lightly overridden” by the court.⁵⁰⁹

III. Conclusion

It is observed that the central theme that permeates the 1998 Act is the idea that the Convention rights should be domestically available in law within the restrictions imposed by the doctrine of parliamentary sovereignty. The major means of making the rights available domestically were section 3(1) interpretations and section 4 declarations. These, together with the provisions in sections 6 and 10, indicate that courts were not expected, under the terms of the 1998 Act, to undermine the will of Parliament under the guise of statutory interpretation. While the rule of interpretation contained in section 3(1) of the Act is an important means of delivering the Convention rights, there is nothing in the Act to suggest that the courts are thereby authorised to nullify what they determine to be the true effect of unambiguous legislative provisions solely on the ground of incompatibility with the Convention rights.

However, as the limit of the interpretative obligation was not made expressly clear, it falls on the courts themselves to define the scope of the obligation. In the next chapter, judicial approaches to interpretation pursuant to the interpretative obligation under section 3(1) will be examined.

CHAPTER 6

⁵⁰⁹ [2008] UKHL 15; [2008] 1 AC 1312, see paragraph 33 of the judgment, per Lord Bingham.

STATUTORY INTERPRETATION UNDER SECTION 3(1) HUMAN RIGHTS ACT

“It is now plain that the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary”⁵¹⁰

I. Introduction

The main aim of this chapter of the thesis is to examine judicial approaches to the interpretation and application of primary legislation found to contravene rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁵¹¹ pursuant to the courts’ interpretative obligation contained in section 3(1) of the Human Rights Act 1998. The differing approaches adopted by the judges will be analysed, and their impact on the traditional concept of parliamentary sovereignty will be assessed. The different approaches adopted mirror the respective judges’ perception of the interpretative obligation under section 3(1) of the Act. As will be observed in the course of the chapter, the dominant approach seems to indicate that the courts feel able to judicially modify offending (but otherwise clear and unambiguous) provisions of primary legislation if this were necessary to achieve compatibility with Convention rights. It will be argued that, in interpreting primary legislation found to be in breach of Convention rights, increasingly, the courts appear to be less concerned with the possibility of contradicting the traditional concept of parliamentary sovereignty and more concerned with the desire to protect Convention rights. Thus, except in cases where the courts appear to lack the institutional competence necessary to deal with an issue before them, they tend to take it upon themselves to rectify the legislative breach of

⁵¹⁰ Lord Hope in *R v Director of Public Prosecutions, ex parte Kebeline and others; R v Director of Public Prosecutions, ex parte Rechachi* [2000] 2 AC 326 [1999] 4 All ER 801; [1999] 3 WLR 972; [2000] 1 Cr App Rep 275

⁵¹¹ Ratified by the United Kingdom in March 1951. Hereafter, it will be simply called “the Convention”, and the rights guaranteed under it will be called “the Convention rights.”

Convention rights. This, it will be submitted, goes beyond the conventional ways of statutory interpretation discussed in chapter 3 above, and profoundly challenges the traditional concept of parliamentary sovereignty discussed in chapter 2.

II. Judicial Approaches to Interpretation Pursuant to Section 3(1)

An examination of the case law reveals two distinctive judicial approaches to the interpretation and application of primary legislation pursuant to section 3(1) of the 1998 Act. One approach, typified by Lord Steyn's judgment in *R v A*,⁵¹² appears to place the protection of Convention rights over and above concerns for a possible breach of the traditional concept of parliamentary sovereignty. For proponents of this approach, section 3(1) enables the courts to judicially rectify legislative breaches of the Convention rights by way of judicial amendments in appropriate cases. The other approach, typified by Lord Hope's judgment, also in *R v A*, appears to be more cautious, placing more emphasis on the need not to encroach on Parliament's authority to legislate as it pleases. As will be seen shortly, in *R v A*, the approach adopted by Lord Steyn prevailed over that adopted by Lord Hope.

R v A concerned the interpretation and application of the provisions of section 41, and in particular, subsection (3)(c), of the Youth Justice and Criminal Evidence Act 1999.⁵¹³ The relevant provisions of section 41 as well as their legislative history are contained in Appendix 4.

In *R v A*, the defendant was charged with the offence of rape. He did not deny that he had sexual intercourse with the complainant. However, he claimed that the complainant

⁵¹² *R v A (No.2)* [2001] UKHL 25; [2001] 2 WLR 1546; [2002]

⁵¹³ In force since 27 July 1999

consented to the sexual intercourse that took place; alternatively, that he reasonably believed that she consented.

In furtherance of his defence, the defendant, at a preliminary hearing,⁵¹⁴ applied to the court for leave to cross-examine the complainant on an alleged sexual relationship that he had with her within the three weeks preceding the alleged rape.

The trial court refused the application, stating that the defendant could not be allowed to give evidence, either directly or by way of cross-examination, of the complainant's prior sexual history.

The court relied on the so-called *rape shield* provisions contained in section 41(3)(b) and (c) of the Youth Justice and Criminal Evidence Act 1999⁵¹⁵, in refusing the defendant's application.

The defendant's ability to fulfill these conditions stipulated in section 41(3)(b) and (c) was apparently nil. It was not being claimed that the complainant's alleged sexual activities with the defendant had taken place "at or about the same time" with the event in question, as required by section 41(3)(b). Neither was it suggested that the previous sexual behaviour of the complainant was "so similar" to her sexual behaviour at the event in question, as required by section 41(3)(c).

⁵¹⁴ Held pursuant to section 29 of the Criminal Procedure and Investigations Act 1996.

⁵¹⁵ See Appendix 4.

The purpose of seeking to adduce the evidence was clearly to buttress the defendant's defence that the complainant consented to the sexual intercourse that took place; alternatively, that he genuinely believed that she consented to the sexual intercourse.

While the trial judge refused the defendant's application to adduce evidence of his previous sexual relationship with the complainant because the proposed evidence fell short of the conditions imposed by section 41(3)(b) and (c), he nevertheless observed that his ruling might infringe the defendant's right to a fair trial under Article 6 of the Convention. He subsequently granted leave to the defendant to appeal to the Court of Appeal.

On appeal, the Court of Appeal held that while evidence of the complainant's previous sexual relationship with the defendant was admissible under section 41(3)(a) of the 1999 Act in relation to his alternative defence of belief in the complainant's consent, the same evidence could not be admitted in support of the defence of consent itself since the conditions stipulated in section 41(3)(b) and (c) were absent.

It was common ground that the above being so, the trial judge would in due course, have to direct the jury to disregard any evidence of the complainant's previous sexual activity with the defendant as far as the issue of her consent was concerned.

Like the trial court below, the Court of Appeal observed that disregarding the evidence of the complainant's previous sexual relationship with the defendant might violate the defendant's right to a fair trial because such evidence may be relevant both to the issue of belief in consent as well as to the issue of consent itself.

It allowed the appeal.

The prosecution appealed to the House of Lords.

It was common ground amongst all their Lordships that the provisions of section 41, and in particular, section 41(3)(b) and (c), were clear and unambiguous.⁵¹⁶ As can be seen in Appendix 4, the conditions which must be present before a trial judge could exercise his discretion to allow or disallow sexual history evidence are clearly stated in section 41(3)(b) and (c). These conditions are mandatory and cannot be waived by the judge.

Two specific issues arose for the determination of the House. The first issue was whether, giving their clear and unambiguous meaning, the effect of the exclusionary provisions contained in section 41(3)(c) was such that they may infringe the right of a defendant to a fair trial as guaranteed by Article 6 of the Convention.

If the above issue were resolved in the affirmative, the second issue was whether the House could judicially modify the provision to make it Convention-compatible by use of its interpretative power under section 3(1) of the 1998 Act.⁵¹⁷

Lord Steyn who delivered the lead judgment,⁵¹⁸ expressed the view that the restrictions imposed on the admissibility of the sexual history of a complainant with third parties was justified in that such evidence was almost always irrelevant. However, the severe restriction

⁵¹⁶ See for e.g. Lord Slynn (paragraphs 7-10 of the judgment),

⁵¹⁷ Of course, they could make a declaration of incompatibility under section 4 of the 1998 Act if they decided they could not use section 3(1) of the Act in the circumstances of the case.

⁵¹⁸ To which the other of their Lordships (except Lord Hope) expressed their broad agreements

imposed on the admissibility of the sexual history of the complainant with the defendant himself “poses an acute problem of proportionality.”⁵¹⁹

This problem arises because there are two interests to be protected by Parliament in these circumstances. On the one hand, there is the interest of the complainant to be protected from being harassed in court by unnecessary questioning on her sexual history. On the other hand, there is the interest of the defendant to be afforded the opportunity of adequately defending himself by allowing him full presentation of all relevant evidence in support of his defence.

Thus, for Lord Steyn, the question was whether Parliament struck the right balance between these competing interests when it enacted these restrictions in section 41(3)(b) and (c) of the Youth Justice and Criminal Evidence Act 1999.

Counsel for the Secretary of State had argued, relying on the case of *Brown v Stott*⁵²⁰ that it was within the discretionary area of judgment for Parliament to make the decision as to the appropriate point of balance between the competing interest of the complainant and that of the defendant.⁵²¹ Thus, it would be inappropriate for the court to impose its own views of what the point of balance should be. The court should, on democratic grounds, defer to the judgment of Parliament.

While agreeing with the general principle stated above, Lord Steyn countered that “when the question arises whether in the criminal statute in question Parliament adopted a legislative

⁵¹⁹ Para. 29 of the judgment

⁵²⁰ [2001] 2 WLR 817

⁵²¹ An argument that found favour with Lord Hope

scheme which makes an excessive inroad into the right to a fair trial the court is qualified to make its own judgment and must do so.”⁵²²

It is submitted that Lord Steyn’s answer to counsel’s contention was correct. It is certainly within the institutional competence of the court to investigate the question whether a particular piece of legislation is incompatible with the Convention. In doing so, the court is required, in appropriate cases, to take into account the discretionary area of judgment of the legislature and the executive. This will be done, for example, in cases where the Convention right in question is not absolute, but subject to permissible or justifiable limitations imposed by the State. But even in such cases, the courts retain the right to subject the statute to the test of proportionality. Where the statute fails the proportionality test, the result would be that the legislative provision in question is incompatible with the relevant Convention right. At this point, the court may proceed to consider whether to act under section 3(1) of the 1998 Act by construing the provision in a manner compatible with the Convention right(s), or to make a declaration of incompatibility under section 4 of the Act.

In deciding whether Parliament struck the proper balance between the two competing interests stated above, Lord Steyn aligned himself with the criticism levelled against section 41 of the 1999 Act by Professor Diane Birch:

“Under section 41, the complainant’s sexual behaviour (including behaviour with the accused) has relevance to consent only where it took place at or about the same time as the event of the subject-matter of the charge, or where it is strikingly similar to behaviour of the subject-matter of the charge or to any other sexual behaviour alleged to have taken place at or about that time. All that can be revealed, it would seem, is evidence such as that the complainant was seen in a passionate embrace with the accused just before (or just after) the alleged offence; bizarre and unusual conduct like the much-discussed propensity to re-enact the balcony scene from *Romeo and Juliet*,

⁵²² See paragraph 36 of the judgment.

and (perhaps) evidence that the complainant was picking up clients as a prostitute (if it is D's defence that he was so picked up). Along with all the complainant's other sexual doings, the remainder of the history of any sexual relationship the complainant has had with the accused will, it seems, have to be concealed from the jury or magistrates. It is not clear how this is to be done in a case where, for example the parties are living together: is the jury simply to be told what happened in the bedroom without any idea of whether D was a trespasser or an invitee? Presumably there will have to be some concept of background evidence that it is necessary for the jury to know in order to make sense of the evidence in the case.

Section 41 is well-intentioned, but the constraints laid on relevance go too far.”⁵²³

Lord Steyn stressed the point that the previous sexual history of the complainant with the defendant himself may be relevant to the issue of consent depending on the facts of a particular case. He concluded that to exclude such relevant evidence merely on the ground that it falls short of the conditions imposed by section 41(3) would infringe on the defendant's Convention right to a fair trial as guaranteed by Article 6.

The provisions fail the proportionality test. “Whilst the statute pursued desirable goals, the methods adopted amounted to legislative overkill.”⁵²⁴

It was common ground that ordinary methods of statutory interpretation could not be used to bring the evidence that the defendant sought to elicit by way of cross-examination within the requirements of section 41(3) of the Youth Justice and Criminal Evidence Act 1999. The language of the provision was quite clear and unambiguous. By conventional methods of interpretation, a court may depart from the plain language of a statutory provision where it is necessary to avoid absurdity in meaning.⁵²⁵ However, the plain language of section 41(3) of

⁵²³ Birch, D. (2000). "A Better Deal for Vulnerable Witnesses?" Criminal Law Review: 223.

⁵²⁴ Per Lord Steyn. See paragraph 43 of the judgment.

⁵²⁵ See chapter 3 above.

the 1999 Act led to no absurdity. Therefore, as it stood, it was likely that the evidence would have to be excluded. Consequently, the trial might be rendered unfair.

This scenario had the potential of being replicated in a considerable number of cases. Therefore the potential for the exclusionary provision generating a large number of unfair trials could not be ignored. In the circumstances, the court had to either modify the provision pursuant to section 3(1) of the 1998 Act (if possible), or make a declaration of incompatibility under section 4 thereof.

Lord Steyn expressed the view that it was possible in the circumstances to apply the interpretative obligation under section 3(1) of the 1998 Act to the provisions of section 41(3)(c) of the Youth Justice and Criminal Evidence Act 1999 to render the latter compatible with the Convention rights:

“In my view s 3 of the 1998 Act requires the court to subordinate the niceties of the language of s 41(3)(c) of the 1999 Act, and in particular the touchstone of coincidence, to broader considerations of relevance judged by logical and commonsense criteria of time and circumstances.... It is therefore possible under s 3 of the 1998 Act to read s 41 of the 1999 Act, and in particular s 41(3)(c), as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under art 6 of the convention should not be treated as inadmissible.”⁵²⁶

The effect of this judicially inserted proviso to section 41(3)(c) of the 1999 Act is that trial judges are thereby enabled to admit sexual history evidence that falls short of the statutory conditions stipulated in the section if they determine that excluding such evidence in accordance with the section might result in a breach of the Convention right to a fair trial. In other words, trial judges are being directed to *ignore* the statutory effect of section 41(3)(c) of the 1999 Act if this were necessary to ensure compliance with the Convention rights.

⁵²⁶ Paragraph 45 of the judgment

The reasoning behind Lord Steyn's decision to apply the interpretative obligation under section 3(1) of the 1998 Act is that no ambiguity is needed to be present in a statutory provision before it could be subjected to a section 3(1) interpretation. To his Lordship, the predominant consideration of the court, pursuant to the interpretative obligation under section 3(1), is "to strive to find a possible interpretation compatible with Convention rights."⁵²⁷ It matters not that the resultant effect of the application of section 3(1) is that the meaning and effect of the statutory provision appears different from its original state, or is in some way modified.

Noting Lord Hoffmann's dictum in *R v Secretary of State for the Home Department, Ex parte Simms*,⁵²⁸ that where a clear limitation of Convention rights is stated in terms in a statute, it would be impossible to utilise the interpretative obligation under section 3(1) of the 1998 Act, Lord Steyn decided that since no such limitation was present in the Youth Justice and Criminal Evidence Act 1999, application of a section 3(1) interpretation was justified.

Lord Steyn's approach to the use of section 3(1) in the interpretation and application of primary legislation found to contravene Convention rights appears to put the need to protect Convention rights over and above concerns for a possible breach of the traditional doctrine of parliamentary sovereignty and the principle of the separation of powers. The legislative history of section 41(3)(c) of the 1999 Act as outlined in Appendix 4 seems to suggest that the intention of Parliament was to restrict the admission of the sexual history of a rape victim/complainant as much as possible. However, Lord Steyn found the extent of this legislative restriction excessive. While this may be correct, it is submitted that lessening the restrictions should be a function for Parliament, after extensive deliberations, taking into

⁵²⁷ Paragraph 44 of the judgment

⁵²⁸ [2000] 2 AC 115

account the possible effects of any proposed amendments on the position of rape victims, the protection of which section 41 of the Act was specifically enacted. It is submitted that his insertion of a proviso to the section amounted to a judicial amendment of the section, substantially restoring the discretionary powers of trial judges in admitting such evidence. Empowering trial judges to admit sexual history evidence contrary to the clear and unambiguous provisions of section 41(3)(c) seems to amount to a negation of the traditional concept of parliamentary sovereignty, whereby courts are required to obey and apply the clear and unambiguous provisions of primary legislation. It appears to have crossed the boundary between legitimate interpretation under section 3(1) of the 1998 Act into unacceptable interference with legislative power.

A number of commentators have criticised the approach adopted by Lord Steyn in *R v A* as involving an override of clear parliamentary intention. David Sandy has stated that the judicial insertion of “implied provisions” into legislation interpreted under section 3(1) of the 1998 Act would have the effect of empowering judges to “reverse the effect of legislation;” consequently, this would lead to uncertainty and inconsistency in principles of interpretation.⁵²⁹ One would agree with this criticism. It could hardly be doubted that the effect of the judgment in *R v A* was to restore substantial judicial discretion to trial judges on the question of admissibility of sexual history evidence, a discretion that was severely restricted by Parliament in clear and unambiguous terms in section 41 of the 1999 Act.⁵³⁰ It is certainly not clear from the language of section 3(1) of the 1998 Act that Parliament intended that its clear and unambiguous legislative intention could be overridden by the court if that

⁵²⁹ Sandy, D. (2001). “*R v A*: the Death of the Declaration of Incompatibility?” New Law Journal **151.7006** (1615)(16 November): 1615.

⁵³⁰ See Bonner, D., H. Fenwick, et al. (2003). “Judicial Approaches to the Human Rights Act.” International and Comparative Law Quarterly **52.3**: 549.

were necessary to make the legislation compatible with the Convention rights. The provisions in sections 4 and 10 of the 1998 Act seemed to have envisaged that legislative intent would continue to play a part in the interpretation and application of statutes. Thus, where the clear legislative intent embodied in the statute is held to breach the Convention rights, the appropriate judicial decision should be to make a declaration of incompatibility so that legislative remedial action could be considered and taken. This would be more in line with the doctrine of parliamentary sovereignty. As Richard Ekins states, “the entire point of having a non-supreme Bill of Rights is to enable greater consideration of the rights-implications of law, while preserving to Parliament the authority to make legally determinative moral choices.”⁵³¹ Thus, if Parliament had intended that its clear legislative will could be overridden, stronger language such as was used to achieve priority of directly effective Community law over inconsistent primary legislation in the 1972 Act⁵³² could have been used in the 1998 Act.

Lord Steyn’s judgment in *R v A* appears to have been partly influenced by certain ministerial statements made in Parliament in the course of debates on the Human Rights Bill. In the House of Lords, the Lord Chancellor had commented, “in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility.”⁵³³ In the House of Commons, the Home Secretary stated “We expect that, in almost all cases, the courts will be able to interpret the legislation compatibly with the Convention.”⁵³⁴ In his judgment, Lord Steyn seized upon these statements and held them to be equivalent to the Government (as

⁵³¹ Ekins, R. (2003). "A Critique of Radical Approaches to Rights Consistent Statutory Interpretation." European Human Rights Law Review 6: 641-650.

⁵³² See section 2(1) and (4) and section 3(1) of the 1972 Act.

⁵³³ Hansard (HL) 05 February 1998, col. 840

⁵³⁴ Hansard (HC) 16 February 1998, col. 778

promoters of the Bill) holding out that the courts were *intended* to make maximal use of section 3(1) interpretations and minimal use of section 4 declarations.⁵³⁵

It is submitted with respect that it was wrong to so hold. In the first place, a cardinal condition laid down in *Pepper v Hart*,⁵³⁶ which must be fulfilled before ministerial statements could be used by judges as an aid to interpretation, was not present. The ministerial statements concerning the then proposed section 3(1), seized upon by Lord Steyn, were not so clear as to come within *Pepper v Hart* exceptions. The statements were ambiguous and open to alternative interpretations. The ministers might well have been expressing their belief that a vast majority of existing United Kingdom legislation was either wholly consistent with Convention rights, or just slightly inconsistent as to be easily amenable to judicial rectification under section 3(1); therefore, not so much of section 4 declarations might be needed. Secondly, there is the danger in not recognising that the statements might have been influenced by political considerations, and that they were made in a bid to allay fears concerning possible judicial activism and criticism of legislative actions.

The introduction of the Youth Justice and Criminal Evidence Bill into the House of Commons was accompanied by a statement made by the Home Secretary pursuant to the provisions of section 19(1)(a) of the 1998 Act,⁵³⁷ expressing his view that the provisions of the bill were compatible with the Convention rights. It may be argued that the fact that the statement required by section 19(1) was made under section 19(1)(a) rather than under section 19(1)(b), makes a strong case for the decision of Lord Steyn in using section 3(1) of the 1998 Act to interpret section 41(3)(c) of the 1999 Act compatibly with the Convention rights. As indicated in the preceding chapter, a statement under section 19(1)(a) would appear

⁵³⁵ Paragraph 44 of the judgment: “A declaration of incompatibility is a measure of last resort.”

⁵³⁶ [1993] AC 593

⁵³⁷ The provisions of which have been set out in Chapter 5 above. See also Appendix 3.

to carry a strong presumption that no breach of Convention rights was intended. On the other hand, a statement under section 19(1)(b) would seem to suggest that the legislation (enacted without substantial alterations) was intended to apply in its enacted form even if it happened to breach Convention rights. Seen in this light, Lord Steyn's judicial modification of the provisions of section 41(3)(c) of the 1999 Act could be seen as a mere rectification of executive oversight.

It is submitted however, that too much emphasis should not be placed in compatibility statements made pursuant to section 19(1) of the 1998 Act when determining the propriety of applying section 3(1) interpretation to an incompatible statutory provision. This is because the views of the Minister concerned may not always coincide with the enacted intention of Parliament as a whole. It would be more reasonable, it is submitted, for the court to focus more on the final Act passed by Parliament (after extensive deliberations on the bill might have been held), rather than on such ministerial statements. In any case, it is doubtful whether Parliament ever intended that section 19(1) of the 1998 Act should substantially influence courts in coming to a decision whether or not to apply the interpretative obligation under section 3(1) thereof.

Lord Steyn appeared to give the impression that his approach to section 3(1) of the 1998 Act was more in line with obeying the will of Parliament than in challenging it. In fact, his Lordship claimed that his decision to insert a proviso to section 41(3)(c) of the 1999 Act was "in accordance with the will of Parliament reflected in section 3 of the 1998 Act."⁵³⁸ Is he thereby saying that Parliament intended that **all** legislative provisions must be read as if they

⁵³⁸ Paragraph 45 of the judgment. See more generally, his Lordship's quote in note 513 above.

incorporated the Convention rights, and be given effect subject to the relevant Convention right irrespective of any contrary intention contained therein?

One cannot gainsay the fact that the combined effect of section 2(1) and 3(1) of the 1998 Act was intended to strengthen the capacity of the courts to deliver the Convention rights domestically whenever it is possible to do so. As has been stated in the preceding chapter, in interpreting the Convention rights, including issues as to whether primary legislation breaches a Convention right, Parliament has by section 2(1) of the 1998 Act, directed the courts to take into consideration the decisions of the European institutions, including the European Court, whenever such a decision is relevant to the proceedings before the domestic courts. The implication of section 2(1) is that the compatibility of primary legislation, whenever enacted, is intended to be determined by the domestic courts against the background of the current jurisprudence of the European Court on the Convention rights. This would mean that in any given case, the courts would likely use European standards of scrutiny as the minimum standards by which domestic legislation is scrutinised for compliance with the Convention rights.

However, it must be stated that section 2(1) of the 1998 Act clearly has no implications for parliamentary sovereignty. This is because its primary utility is to enable the domestic courts to determine the compatibility of the Convention rights against minimum standards set by the European Court; and a finding of incompatibility does not by itself affect the legal effect of the legislation concerned.

Similarly, Parliament has, by section 3(1) of the 1998 Act, directed the courts to modify, by way of interpretation, incompatible legislation, so as to achieve compatibility with the

Convention rights. This provision is no doubt the most effective and immediate means by which the judiciary could deliver the Convention rights domestically. This is because an interpretation under section 3(1) has the capacity to change the legal effect of the statutory provision so modified. What is more, the interpretative power derived from section 3(1) can be applied to any legislation whenever enacted.

Be that as it may, the question remains, how far did Parliament intend its legislation to be read and given effect compatibly with the Convention rights? Lord Steyn's view on this point seems to suggest that the court's obligation under section 3(1) to interpret legislation compatibly with the Convention rights overrides any intention to the contrary contained in an Act of Parliament, whether passed before or after the 1998 Act. Thus, short of an express repudiation of the Convention rights, Lord Steyn's approach in *R v A* would amount to taking section 3(1) as authorising courts to totally ignore clear parliamentary intention embodied in a statutory provision if found to be incompatible with the Convention rights.

It is respectfully submitted that this analysis is not borne out of the provisions of sections 2(1) and 3(1) of the 1998 Act. As has been observed above, these provisions strengthened the capacity of the courts to deliver the Convention rights domestically. However, the use of the phrase, "so far as it is possible to do so" introduces a limit, albeit undefined, to the extent to which Parliament intended its legislation to be read and given effect in accordance with sections 2(1) and 3(1) of the Act. Further, the markedly different way in which the provisions in section 2(1) and 3(1) of the 1998 Act on the one hand, and those in sections 2(1) and (4) and 3(1) of the European Communities Act 1972⁵³⁹ on the other hand, are couched is indicative of Parliament's desire to give as effective a protection as possible to the

⁵³⁹ See chapter 4 above.

Convention rights without endangering the concept of parliamentary sovereignty. Therefore, the idea that under section 3(1) of the 1998 Act the courts could totally discard parliamentary intention, as they could possibly do under the 1972 Act, seems to be a creation of the courts themselves, and not Parliament. What is apparent from the 1998 Act, taken as a whole, is that the courts should take an even-handed view, protecting the Convention rights as much as they possibly could, until it becomes clear that going any further would endanger parliamentary sovereignty. This balanced approach cannot be achieved if parliamentary intention were to be discarded altogether.

Furthermore, even if it were to be accepted that the decision in *R v A* were “in accordance with the will of Parliament reflected in section 3 of the 1998 Act”, the problem with this is that Lord Steyn appears to be obeying the will of Parliament expressed in the 1998 Act in preference to the will expressed in the 1999 Act. This seems to be contrary to the traditional concept of parliamentary sovereignty, which requires the court to obey and apply the latest intention of Parliament in preference to any contrary intention expressed in previous legislation. This is amply exemplified in the judicial treatment of section 7(1) of the Acquisition of Land (Assessment of Compensation) Act 1919 in *Ellen Street Estates Ltd v Minister of Health*.⁵⁴⁰

The difference in the judicial treatment of the 1919 Act and the 1998 Act appears to lie in the new concept, which seems to have been generally accepted by the judges, that statutes such as the Human Rights Act, are to be considered “constitutional statutes” invulnerable to the principle of implied repeal.⁵⁴¹

⁵⁴⁰ [1934] All ER 385, [1934] 1 KB 590. See Chapters 2 and 5 above.

⁵⁴¹ See *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151, *International Transport Roth GmbH and others v Secretary of State for the Home Department* [2002] EWCA Civ 158. This is discussed below.

As indicated earlier, Lord Hope's approach to the interpretative obligation under section 3(1) of the 1998 Act is different from that adopted by Lord Steyn. For Lord Hope, section 3(1) interpretation is not to be utilised if the legislation under consideration "contains provisions which expressly contradicts the meaning which the enactment would have to be given to make it compatible."⁵⁴² His Lordship went further to contend that "the same result must follow if they do so by **necessary implication**,"⁵⁴³ as this too is a means of identifying the plain intention of Parliament."⁵⁴⁴

In other words, for Lord Hope, section 3(1) does not authorise the contradiction of the plain intention of Parliament in enacting legislation. The intention need not be stated expressly. It could be implied from a contextual examination of the statute. Thus, in *R v A*, his Lordship stated,

"In the present case it seems to me that the **entire structure** of s 41 of the 1999 Act contradicts the idea that it is possible to read into it a new provision which would entitle the court to give leave whenever it was of the opinion that this was required to ensure a fair trial. The whole point of the section, as was made clear during the debates in Parliament, was to address the mischief which was thought to have arisen due to the width of the discretion which had previously been given to the trial judge. A deliberate decision was taken not to follow the examples which were to be found elsewhere, such as in s 275 of the 1995 Act, of provisions which give an overriding discretion to the trial judge to allow the evidence or questioning where it would be contrary to the interests of justice to exclude it. Section 41(2) of the 1999 Act forbids the exercise of such a discretion unless the court is satisfied as to the matters which that subsection identifies. It seems to me that it would not be possible, without contradicting the plain intention of Parliament, to read in a provision which would enable the court to exercise a wider discretion than that permitted by s 41(2)."⁵⁴⁵

⁵⁴² See paragraph 108 of the judgment.

⁵⁴³ Bold type supplied for emphasis.

⁵⁴⁴ See paragraph 108 of the judgment.

⁵⁴⁵ See paragraph 109 of the judgment. Bold type supplied for emphasis

As can be seen, while Lord Steyn's approach is more radical in nature in that it places more emphasis on the role of the interpretative obligation in section 3(1) and less emphasis on the plain parliamentary intention contained in the enactment under consideration, Lord Hope's approach is more cautious.

It is submitted that Lord Hope's approach to the interpretation and application of primary legislation under section 3(1) accords greater respect to the doctrine of parliamentary sovereignty than Lord Steyn's approach. In the approach adopted by Lord Hope, parliamentary intention in legislation continues to play a central role in the interpretative process. Thus, where a court determines that there is a direct clash between the parliamentary intention contained in section 3(1) of the 1998 Act, and that contained in a later enactment such as the 1999 Act considered in *R v A*, the court ought to make a declaration of incompatibility under section 4, thereby drawing the attention of the executive and Parliament to the incompatibility. In line with the traditional doctrine of parliamentary sovereignty and the principle of the separation of powers, it should be for Parliament to decide whether to persist in the breach of the Convention rights or to make the necessary amendments to achieve compatibility with the Convention rights.⁵⁴⁶

While in *R v A*, Lord Steyn's approach to the use of section 3(1) of the 1998 Act appeared to indicate that the absence of a clearly expressed parliamentary intention in the statutory provision under consideration, to depart from the terms of section 3(1) of the 1998 Act, is sufficient reason to justify a section 3(1) interpretation, in *Ghaidan v Mendoza*,⁵⁴⁷ Lord Nicholls opted for a slightly different, albeit equally creative approach. Lord Nicholl's

⁵⁴⁶ It should be mentioned however, that in the end, Lord Hope agreed with the other of their Lordships to apply section 3(1) interpretation to the provisions of section 41(3)(c) of the 1999 Act.

⁵⁴⁷ [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 All ER 411

analysis of the interpretative obligation under section 3(1) calls for the recognition of a distinction between the actual language used in the statutory provision under consideration on the one hand, and the underlying concept behind the legislation on the other hand. His approach focuses more on the concept behind the legislation and less on the language used in it. He contends that section 3(1) of the 1998 Act authorises the court to change the meaning and effect of primary legislation if this were required to achieve compatibility with the Convention rights. In other words, pursuant to the interpretative obligation under section 3(1), the court may depart from the unambiguous parliamentary intention indicated by the language used in the provision. However, Lord Nicholls declares that the resultant meaning must not be inconsistent with the underlying concept behind the legislation. The new meaning must not depart from the fundamental features of the enactment under consideration. It must be compatible with the underlying thrust of the enactment. Therefore, as far as the resultant meaning could come within the underlying concept of the legislation, the fact that it contradicts the actual language used in the provision under consideration becomes irrelevant.

Ghaidan v Mendoza concerned the interpretation of “spouse” as contained in paragraph 2(1) and (2) of Schedule 1 to the Rent Act 1977, the provisions were as follows:

“2. – (1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence.

(2) For the purpose of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant.”⁵⁴⁸

The defendant, Mr. Godin-Mendoza, was a homosexual who had “a stable and monogamous homosexual relationship”⁵⁴⁹ with a Mr. Hugh Wallwyn-James. The couple lived together from April 1983 to 05 January 2001 (when Mr. Wallwyn-James died) at a flat in which Mr. Wallwyn-James was the statutory tenant by virtue of the provisions of the 1977 Act.

After the death of Mr. Wallwyn-James the statutory tenant, his landlord, Mr. Ahmad Ghaidan, instituted proceedings at the County Court for recovery of possession of the flat.

At the trial, the County Court judge held that the defendant could not succeed to the statutory tenancy of the flat as the “spouse” of the original tenant pursuant to paragraphs 2(1) and (2) of Schedule 1 to the 1977 Act set out above.

However, the County Court held that the defendant was entitled to an assured tenancy of the flat as “a member of the original tenant’s family” in accordance with paragraph 3(1) of the Schedule. The paragraph provided as follows:

“Where paragraph 2 above does not apply, but a person who was a member of the original tenant's family was residing with him in the dwelling-house at the time of and for the period of 2 years immediately before his death then, after his death, that person or if there is more than one such person such one of them as may be decided by

⁵⁴⁸ See Appendix 5 for a brief legislative history of these provisions.

⁵⁴⁹ Per Lord Nicholls, at paragraph. 2 of the judgment.

agreement, or in default of agreement by the county court, shall be entitled to an assured tenancy of the dwelling-house by succession.”

This decision was in obedience to the decision of the House of Lords in *Fitzpatrick v Sterling Housing Association Ltd*,⁵⁵⁰ a case decided before the 1998 Act came into operation. There, the House had held that the extended meaning given to the word “spouse” in paragraph 2(2) of the Schedule set out above did not include same-sex partners. This was because by paragraph 2(1), the word, “spouse” referred to legally married couples. Marriage could legally occur only between a man and a woman. The word was therefore gender-specific. Accordingly, the expression, “as his or her wife or husband” as used in paragraph 2(2) could only refer to a person who was living together with a person of the opposite sex as if legally married.

However, by a majority, their Lordships also held in *Fitzpatrick* that the word, “family” as used in paragraph 3(1) of the Schedule set out above could be extended to include same-sex partners who could show “a degree of mutual inter-dependence, of the sharing of lives, of caring and love, of commitment and support.”⁵⁵¹ The basis of this decision was that the term “family” had been applied in a flexible manner in the case law and that it was appropriate to give it an up-dating interpretation to accommodate changing social attitudes.⁵⁵²

⁵⁵⁰ [1999] 4 All ER 705, [1999] 3 WLR 1113

⁵⁵¹ Ibid, per Lord Slynn of Hadley.

⁵⁵² For decisions demonstrating the flexible nature of the word “family,” see the following cases: *Gammans v Ekins* (1950) 2 All ER 140; (1950) 2 KB 328; *Dyson Holdings Ltd v Fox* [1975] 3 All ER 1030, [1976] QB 503; *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257; *Barclays Bank Plc v O’Brien* [1993] 4 All ER 417; *Brock v Wollams* [1949] 1 All ER 715; *Price v Gould* (1930) 143 LT 333; *Ross v Collins* [1964] 1 All ER 861; *Watson v Lucas* [1980] 3 All ER 647; *Hawes v Evenden* [1953] 2 All ER 737, *Chios Property Investment Co. Ltd v Lopez* (1987) 20 HLR 120; *Jones v Whitehill* [1950] 2 KB 204.

In the instant case, on Mr Mendoza's appeal to the Court of Appeal, it was decided that Mr. Mendoza could succeed to the statutory tenancy of the flat as the surviving "spouse" of the deceased tenant in accordance with paragraph 2(2) of the Schedule.

The claimant then appealed to the House of Lords.

It was common ground amongst their Lordships that by the ordinary principles of interpretation, the extended meaning of the term "spouse" in paragraph 2(2) of the Schedule to the 1977 Act unambiguously referred to heterosexual couples and not to homosexual couples. Their Lordships were also in agreement that the differential treatment between unmarried heterosexual couples and homosexual couples was discriminatory and incompatible with the Convention rights. The point of disagreement amongst them was on the question whether it was possible, given the facts and circumstances of the case, to act pursuant to the interpretative obligation in section 3(1) of the 1998 Act and interpret "spouse" so as to bring homosexual partners within the provisions of paragraph 2 of Schedule 1 of the 1977 Act, or to merely make a declaration of incompatibility under section 4 of the 1998 Act, thereby leaving it to the appropriate minister of the Crown, and ultimately Parliament, to make the necessary amendment (if they so wished) under section 10 and Schedule 2 to the 1998 Act. A majority of their Lordships⁵⁵³ decided that it was possible to do so. However, Lord Millett disagreed.

As indicated above, Lord Nicholl's⁵⁵⁴ approach was to identify the underlying concept behind the legislative protection afforded unmarried couples under paragraph 2(2) of

⁵⁵³ A majority of 4-1, with Lord Millett dissenting

⁵⁵⁴ Whose judgment enjoyed the broad agreement of the other of their Lordships (except Lord Millett).

Schedule 1 to the 1977 Act, and then determine whether the resultant interpretation under section 3(1) of the 1998 Act would conflict with the identified underlying concept. An interpretation that is consistent with the underlying concept would be justified, irrespective of a resulting departure from the plain meaning of the term “spouse” as used in the provision. On the other hand, an interpretation that is contrary to the identified underlying concept will not be possible under section 3(1).

His Lordship found that the reason for enacting paragraph 2(2) of Schedule 1 to the Rent Act 1977 to extend security of tenure to the survivor of unmarried couples who had lived together as if married was that there was no practical difference in circumstances between, on the one hand, legally married couples, and on the other hand, couples who for all practical purposes lived as if married. In each case, the couples lived together and presumably made their home together. Absenting irrelevant religious morals, there was no point in securing the tenure of surviving married couples who had been living with their deceased husbands or wives, while denying the same right to surviving unmarried couples who had also been living with their deceased partners. This is because the legislative objective was to give security to the *home* of the couple and to prevent it from being disrupted simply because one of the couple had died.

Therefore, to qualify under the provisions, a surviving heterosexual partner only had to establish that for all practical purposes, he or she had been living together with the deceased as if married. In this respect, it would be sufficient if it was proved that the couple had been living together in a close, stable and long-term sexual relationship, sharing their lives and making their home together.

Thus, the underlying concept behind paragraph 2(2) was to give security of tenure to the *home* of the couple, and for the benefit of the surviving couple. It did not matter whether the couple was married or unmarried. Seen in this light, extending security of tenure to homosexual couples who, like their unmarried heterosexual counterparts, had been living together in a close, stable and long-term relationship will be consistent with the underlying thrust of the legislation. Except for their sexual orientation, there is no rational basis for treating them differently. The critical factor, which is the sharing of lives and the making of a home together, is common to either set of couples. Accordingly, it was possible, acting pursuant to the interpretative obligation under section 3(1) of the 1998 Act, to extend the meaning of “spouse” as used in paragraph 2(2) of Schedule 1 to the Rent Act 1977, to include the surviving homosexual partner of a deceased tenant with whom he/she had lived together in a close and stable relationship.

Although Lord Nicholl’s methodology on section 3(1) interpretations seems slightly different from that of Lord Steyn, their perception of the interpretative obligation contained in section 3(1) of the 1998 Act is largely similar. In interpreting legislation under section 3(1), both of them appear to de-emphasise the intention of Parliament in enacting the legislative provision under consideration, as apparent from the plain language used. Instead, they seem to focus more on the desire to fulfill the parliamentary intention expressed in section 3(1), which is construing legislation so far as it is possible to do so, compatibly with the Convention rights. The principled balance between on the one hand, the effective protection of Convention rights and on the other hand, respect for the doctrine of parliamentary sovereignty and the

separation of powers, advocated by Lord Irvine,⁵⁵⁵ appears to have no place in their Lordships' perception of the interpretative obligation.

However, Lord Steyn's approach appears somewhat more far-reaching than that of Lord Nicholls'. Lord Steyn has expressed the view that section 3(1) is the "principal remedial measure" under the 1998 Act and that a declaration of incompatibility under section 4 should be seen as "a measure of last resort."⁵⁵⁶ Lord Steyn asserts

"In enacting the 1998 Act Parliament legislated 'to bring rights home' from the European Court of Human Rights to be determined in the courts of the United Kingdom. That is what the White Paper said.... That is what Parliament was told. The mischief to be addressed was the fact that convention rights as set out in the European Convention, which Britain ratified in 1951, could not be vindicated in our courts. Critical to this purpose was the enactment of effective remedial provisions."⁵⁵⁷

He then went on to state that "If Parliament disagrees with an interpretation by the courts under s. 3(1), it is free to override it by amending the legislation and *expressly* reinstating the incompatibility."⁵⁵⁸

This seems to suggest that for Lord Steyn, parliamentary intention expressed in an Act of Parliament found to be incompatible with the Convention rights plays such an insignificant role that it could more often than not be discarded in order to protect the Convention rights from legislative encroachment. It is submitted that this approach over-stresses the role of the court in the scheme of the 1998 Act, tends very much towards judicial activism and is inherently inimical to the traditional concept of parliamentary sovereignty.

⁵⁵⁵ Irvine (1999). "Activism and Restraint: Human Rights and the Interpretative Process." European Human Rights Law Review 4: 350-372.

⁵⁵⁶ *Ghaidan v Mendoza* [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 All ER 411 at paragraph 39 of the judgment

⁵⁵⁷ Ibid, at paragraph 42

⁵⁵⁸ Ibid, at paragraph 42

On the other hand, Lord Nicholl's proposition that the resultant interpretation under section 3(1) should be consistent with the underlying concept behind the legislation under consideration has the advantage of downplaying the creative role of the court in construing legislation compatibly with the Convention rights and seemingly according more prominence to the legislative function. This approach tends to create the impression that the courts are merely assisting Parliament to fulfill to the fullest extent possible the unexpressed purpose of the legislation under consideration and at the same time meeting the obligations of the United Kingdom under the Convention as envisaged by the 1998 Act

It is submitted however, that Lord Nicholl's seemingly less far-reaching approach in fact disguises a high degree of judicial activism. Granting substantive legal rights to homosexual partners in the manner done by Lord Nicholls in *Ghaidan v Mendoza* seems to amount to an usurpation of legislative functions beyond the scope of what is possible under section 3(1), especially taking account of the legislative history of paragraph 2(2) of Schedule 1 to the Rent Act 1977, which was the subject of his Lordship's interpretation pursuant to section 3(1) of the 1998 Act.⁵⁵⁹

It is submitted that Lord Millett's dissenting opinion on the propriety of using section 3(1) in the circumstances of the case is preferable to that of the majority. As indicated earlier, Lord Millett was of the view that it was impossible to use section 3(1) of the 1998 Act to construe paragraph 2(2) of Schedule 1 to the 1977 Act so as to include homosexual partners in the

⁵⁵⁹ See Hitchings, E. (2003). "Case Commentary -- *Mendoza v Ghaidan* -- Two Steps Forward, One Step Back." *Child and Family Law Quarterly* **CFam 15.3 (313)**(September): 313.

, Mead, D. (2003). "Swallowing the Camel, Straining at the Gnat: The Implications of *Mendoza v Ghaidan*." *European Human Rights Law Review* **5**: 501-513.

statutory definition of a “spouse”. In coming to this conclusion, his Lordship relied on the legislative history of paragraph 2(2)⁵⁶⁰. As he stated, “the limit on the application of s 3... may also be derived from a consideration of the legislative history of the offending statute”⁵⁶¹. From the legislative history of paragraph 2(2) of Schedule 1 to the 1977 Act (see Appendix 5), one cannot escape the gender-specific nature of the statutory scheme. As Lord Millett states, paragraph 2(2) as amended does not expressly refer to “a person of the opposite sex” but the phrase is implicit in the provision. At a time when Parliament had not legislated to grant marital rights to same-sex partners, it would appear absurd to further strain the extended meaning of “spouse” to cover same-sex partners.

Accordingly, Lord Millett concluded that an interpretation of paragraph 2(2) to include same-sex partners would be manifestly inconsistent with an essential feature of the kind of relationship which Parliament had in mind when it enacted the 1977 Act, that is an open relationship between persons of the opposite sex. To him, this would be impermissible under section 3(1) of the 1998 Act. Furthermore, extending substantive rights to same-sex partners in the manner done by the majority seems to involve “questions of social policy which should be left to Parliament.”⁵⁶²

It is submitted that Lord Millett’s judgment exhibits a better appreciation of the place of parliamentary sovereignty and the role of the judge in the scheme of the 1998 Act. Although the wording of section 3(1) of the 1998 Act is so imprecise as to make any interpretation seemingly possible, the combined effects of the provisions of section 3(2)(b) and (c), section

⁵⁶⁰ See Appendix 5.

⁵⁶¹ *Ghaidan v Mendoza* [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 All ER 411 at paragraph 72 of the judgment

⁵⁶² Paragraph 101 of the judgment

4, section 10 and Schedule 2 of the Act indicate limits to the use of section 3(1) in construing legislation compatibly with the Convention rights. These provisions are an indication that courts were expected to respect parliamentary sovereignty and were to refrain from interpretations that may offend the concept. Thus, where there are reasonable grounds for believing that a section 3(1) interpretation may lead to a breach of parliamentary sovereignty, the appropriate thing for a court to do should be to make a declaration of incompatibility and leave it to the Government and ultimately Parliament to decide whether to amend the law or not. It is submitted that an interpretation under section 3(1) that, for all practical purposes, grants substantive rights to same-sex partners in a bid to fill a perceived gap in the statute breaches the traditional concept of parliamentary sovereignty. This seems to be the case with the majority decision in *Ghaidan v Mendoza*.

The majority's decision appeared to have been influenced by a number of factors. In July 2003, the European Court had delivered a decision that effectively condemned differences in legal treatment between unmarried heterosexual couples and their homosexual counterparts (such as that found in paragraph 2(2) of the Schedule above) as discriminatory and contrary to the Convention right under Article 14 read in conjunction with Article 8⁵⁶³. That case was *Karner v Austria*.⁵⁶⁴

The case was quite similar to *Ghaidan v Mendoza*. The applicant had survived his homosexual partner with whom he had been living together for several years in a flat originally rented by his partner. When the partner died, the landlord took legal proceedings to recover possession of the flat. Both the trial court and the appeal court accepted the view that

⁵⁶³ Article 14 prohibits discrimination in the enjoyment of the Convention rights, while Article 8 protects the right to respect for the individual's private and family life.

⁵⁶⁴ [2003] ECHR 40016/98

the applicant could succeed to the tenancy by virtue of section 14(3) of the Austrian Tenancy Act which provided that family members could so succeed. But on appeal by the landlord to the Supreme Court, it was held that the notion of “life companion” which could have enabled the applicant to succeed under section 14(3) of the Act did not include persons in same-sex relationships.

The applicant then applied to the European Court, arguing that denying him the right to succeed to his deceased partner’s tenancy on the basis of his sexual orientation violated his rights under Article 14 read in conjunction with Article 8.

The European Court held that for such differential treatment to be upheld, not only is it required of the state to show that there was a reasonable and justifiable legislative aim, but also that the difference in treatment was necessary to achieve the legislative aim. The Court declared that the Austrian Government had failed to show any justification for the differential treatment between homosexual partners on the one hand and heterosexual partners on the other hand.

At the time *Karner’s* case was decided by the European Court, the Civil Partnership Bill⁵⁶⁵ was then before Parliament. In acknowledgment of the decision, Parliament introduced provisions into the Bill for the purpose of amending paragraph 2 of Schedule 1 to the Rent Act 1977 to eliminate the discrimination inherent in it. The amendment was contained in what became paragraph 13 of Schedule 8 to the Civil Partnership Act 2004. A new provision was added to paragraph 2(2):

⁵⁶⁵ Which became the Civil Partnership Act of 2004. The Act enabled same-sex partners to enter into civil partnerships and accorded them equal rights with married couples.

“(2) For the purposes of this paragraph–

(a) a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant, and

(b) a person who was living with the original tenant as if they were civil partners shall be treated as the civil partner of the original tenant.”⁵⁶⁶

Sub-paragraph 3 was also amended accordingly. These amendments thus removed the discrimination against homosexual partners and rendered the Rent Act 1977 compatible with the Convention rights. Thus, the decision in *Ghaidan* was in a way an adoption of the parliamentary decision apparent in the amendments set out above.

Nevertheless, it is important to bear in mind that at the time the House of Lords decided *Ghaidan*, the above amendments were only provisions contained in a Bill before Parliament. Consequently, the majority decision seemed to have had the effect of fast-tracking the operation of the then proposed amendments. It is submitted that this, at least in principle, was wrong. It should be left to Parliament to determine if and when such substantive legal rights would be granted to same-sex partners. The granting of such substantive legal rights should be by deliberate legislative action rather than the consequence of judicial activism as is the case in *Ghaidan*.

The way in which the judges have dealt with legislative encroachments of the right to a fair trial guaranteed by Article 6 of the Convention further indicate the extent to which they seem prepared to ignore clear and unambiguous parliamentary intention in order to protect the

⁵⁶⁶ Bold type supplied for emphasis. This is the relevant amendment.

Convention rights. In addition to *R v A* discussed above, two other cases in particular appear to indicate that where the right to a fair trial is concerned (an area in which the courts feel particularly competent to make decisions), judges could, acting pursuant to the interpretative obligation under section 3(1) of the 1998 Act, nullify the legislative violation by modifying the legal effect of the statutory provisions concerned. As would be seen shortly, in so applying the section 3(1) interpretation for the purpose of protecting the right to a fair trial, the judges appear to give little or no consideration to legislative choices made by Parliament in enacting the statute under consideration. On the contrary, the judges have felt able to replace parliamentary choices with their own judicial choices if this were necessary to protect the Convention right to a fair trial.

The decisions of the House of Lords in *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No. 4 of 2002)* (conjoined appeals)⁵⁶⁷ and *Secretary of State for the Home Department (Respondent) v MB (FC) (Appellant); Secretary of State for the Home Department (Respondent) v AF (FC) (Appellant); Secretary of State for the Home Department (Appellant) v AF (FC) (Respondent)* (conjoined appeals)⁵⁶⁸ support the remarks made above.

The issues common to the two cases in the first of the co-joined appeals mentioned above⁵⁶⁹ was whether the statutory provisions under consideration violated the presumption of innocence provided for by Article 6(2) of the Convention and, if so, whether it would be possible to construe them in a manner that preserved the broader right to a fair trial.

⁵⁶⁷ [2004] UKHL 43; [2005] 1 AC 264

⁵⁶⁸ [2007] UKHL 46

⁵⁶⁹ That is, *Sheldrake's* case and *Attorney General's Reference (No. 4 of 2002)*.

It has been widely recognised, since *Woolmington v Director of Public Prosecutions*,⁵⁷⁰ that the presumption of innocence is a fundamental principle of the common law. In that case, Viscount Sankey stated:

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”⁵⁷¹

As indicated above, the general principle is that the burden is on the prosecution to prove its allegations against the accused; conversely, the accused is not required to prove his innocence.

Article 6(2) of the Convention embodies the same principle. It says: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

However, as could be seen from Viscount Sankey's statement above, the courts have always recognised that the common law principle of the presumption of innocence was subject to statutory exceptions. Thus, Parliament could breach the principle by imposing a legal burden of proof on accused persons whenever it thought fit to do so. This it continued to do even after the ratification of the Convention. Ashworth and Blake have provided several examples of such statutes in their article written in 1996.⁵⁷² The courts were bound to apply them. It did

⁵⁷⁰ [1935] AC 462

⁵⁷¹ Ibid, at p. 481

⁵⁷² Ashworth, A. and M. Blake (1996). "The Presumption of Innocence in English Criminal Law." Criminal Law Review: 306.

not matter that they infringed on Convention rights. A combination of the doctrine of parliamentary sovereignty and the principle that the Convention had no force of law except to the extent incorporated in domestic law ensured that the courts obeyed and applied them in accordance with the intention of Parliament. As Lord Hope observed in *R v Director of Public Prosecutions, ex parte Kebeline and others; R v Director of Public Prosecutions, ex parte Rechachi*, a case decided before the coming into effect of the 1998 Act, “under the doctrine of sovereignty, the only check on Parliament’s freedom to legislate in this area has been political.”⁵⁷³ His Lordship nevertheless indicated, “that will now change with the coming into force of the Human Rights Act 1998.”⁵⁷⁴

The relevant statutory provision in *Sheldrake’s* case was contained in section 5(2) of the Road Traffic Act 1988. The sub-section provided that

“It is a defence for a person charged with an offence under subsection (1)(b) above to **prove**⁵⁷⁵ that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.”

In *Attorney General’s Reference*, the relevant provisions are contained in section 11(1) and (2) of the Terrorism Act 2000, which provided as follows:

⁵⁷³ [1999] 4 All ER 801; [1999] 3 WLR 972; [2000] 1 Cr App Rep 275. See also the speech of Lord Bingham at paragraphs 6 and 7 of his judgment in *Sheldrake v Director of Public Prosecutions; Attorney General’s Reference (No. 4 of 2002)* [2004] UKHL 43; [2005] 1 AC 264:

⁵⁷⁴ [1999] 4 All ER 801.

⁵⁷⁵ Bold type supplied for emphasis.

“(1) A person commits an offence if he belongs or professes to belong to a proscribed organisation.

(2) It is a defence for a person charged with an offence under subsection (1) to **prove**⁵⁷⁶—

- (a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and
- (b) that he has not taken part in the activities of the organisation at any time while it was proscribed.”

It was common ground amongst their Lordships that both provisions set out above were clear and unambiguous and that the parliamentary intention was to impose a legal burden of proof on the defendant. Thus, absente the 1998 Act, the courts would have had to apply the provisions without further considerations. Indeed, Lord Bingham, who delivered the lead judgement, alluded to this when he stated:

“Until the coming into force of the Human Rights Act 1998, the issue now before the House could scarcely have arisen. The two statutory provisions, which it is necessary to consider, are not obscure or ambiguous. They afford the defendant (Mr Sheldrake) and the acquitted person a ground of exoneration, but in each case the provision, interpreted in accordance with the canons of construction ordinarily applied in the courts, would (as already noted) be understood to impose on the defendant a legal burden to establish that ground of exoneration on the balance of probabilities. Until October 2000 the courts would have been bound to interpret the provisions conventionally. Even if minded to do so, they could not have struck down or amended the provisions as repugnant to any statutory or common law rule. Domestic law would have required effect to be given to them according to their accepted meaning. Thus the crucial question is whether the European Convention and the Strasbourg

⁵⁷⁶ Bold type supplied for emphasis.

jurisprudence interpreting it have modified in any relevant respect our domestic regime and, if so, to what extent.”⁵⁷⁷

Thus, with the enactment of the 1998 Act, courts now have not only a duty to determine whether legislative provisions such as the ones set out above contravene the Convention right to a fair trial, but also to consider whether it would be possible to interpret them compatibly with the Convention rights pursuant to section 3(1) of the Act.

As observed in chapter 5 above, section 2 of the 1998 Act contains a direction to the courts that they must take into account the jurisprudence of the European Court when determining a question concerning a Convention right. Although under that section, decisions of the European Court do not constitute binding precedent for the domestic courts, considerable weight is likely to be given to them since ultimately, domestic disputes may go to the European Court for adjudication after exhaustion of all domestic avenues.

Unsurprisingly therefore, in determining whether the provisions set out above breached the right to a fair trial under Article 6, the House of Lords adopted the principles stated by the European Court in *Salabiaku v France*.⁵⁷⁸

In that case, the European Court had held that Article 6(2) of the Convention did not constitute an absolute bar on legislation that required the accused to prove particular facts. According to it:

“Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the

⁵⁷⁷ [2004] UKHL 43; [2005] 1 AC 264 at paragraph 7 of the judgment

⁵⁷⁸ [1988] 13 EHRR 379

Contracting States to remain within certain limits in this respect as regards criminal law.”⁵⁷⁹

The margin allowed states to make in-roads into the presumption of innocence was not to be considered by exclusive reference to domestic law. The Convention required that states must not go beyond the point where the right to a fair trial under Article 6(1) is endangered. The European Court held:

“Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”⁵⁸⁰

The most notable thing about the judgment in *Salabiaku* is that the enactment of a reverse burden in itself is no sufficient ground to declare the statutory provision as incompatible with the Convention. This is because, as stated above, the presumption of innocence is not an absolute right, but only an aspect of the broader right to a fair trial set out in Article 6(1) of the Convention.

Therefore, to found incompatibility, the question whether the state has exceeded reasonable limits has to be answered first. This would involve considerations of proportionality. The court would have to balance competing interests. The importance of what is at stake would be considered. More serious problems might require drastic legislative solutions that might necessitate or justify making an in-road into the presumption of innocence.

⁵⁷⁹ Ibid

⁵⁸⁰ Ibid

On the other hand, the rights of the defence and any protection that the legislation offered the accused must also be taken into consideration. The greater the protection offered the accused, the more unlikely that the legislation will be held in violation of the Convention.

In *Sheldrake*, their Lordships were unanimous in holding that the legal burden of proof imposed on the defendant by section 5(2) of the Road Traffic Act 1988 was within reasonable and permissible limits and was consequently justifiable and compatible with the right to a fair trial. As a result no question of a section 3(1) interpretation arose.

However, in *Attorney General's Reference*, a 3-2 majority of the House of Lords held the legal burden of proof imposed on the defendant by section 11(2) of the Terrorism Act 2000 to have exceeded permissible limits and therefore incompatible with the right to a fair trial.⁵⁸¹ Their Lordships went further to hold that it was possible under section 3(1) of the 1998 Act to eliminate the incompatibility by substituting the legal burden of proof imposed by Parliament with an evidential burden only, which requires the defendant only to raise an issue sufficient to create a reasonable doubt as to his guilt.

In coming to the conclusion that it was possible to judicially eliminate the incompatibility by use of section 3(1) interpretation, the approach adopted by Lord Bingham was quite similar to that of Lord Steyn discussed earlier. His perception of the interpretative obligation seems to be that it takes priority over the intention of Parliament expressed in other Acts, pre- or post-Human Rights Act. His Lordship conceded that the clear and unambiguous intention of Parliament in enacting section 11(2) of the Terrorism Act 2000 was to impose a legal burden

⁵⁸¹ Lord Rodger and Lord Carswell were of the opinion that there was no incompatibility.

of proof on the defendant.⁵⁸² However, he rejected counsel's submission that should the House find the statutory provision to be incompatible with the right to a fair trial, it should make a declaration of incompatibility under section 4 of the 1998 Act and allow Parliament to choose between amending it on the one hand, and leaving it untouched on the other hand. His Lordship states:

"I cannot accept this submission.... In my opinion, reading down section 11(2) so as to impose an evidential instead of a legal burden falls well within the interpretative principles discussed above. **The subsection should be treated as if section 118(2) applied to it.**⁵⁸³ Such was not the intention of Parliament when enacting the 2000 Act, but it was the intention of Parliament when enacting section 3 of the 1998 Act."⁵⁸⁴

In response to dicta in *Kebeline*,⁵⁸⁵ Parliament had in Section 118 of the Terrorism Act 2000 watered down the legal burden of proof imposed on an accused person under relevant sections of the Act, and had in effect made such burdens evidential only. The section provided as follows:

"118. — Defences.

(1) Subsection (2) applies where in accordance with a provision mentioned in subsection (5) it is a defence for a person charged with an offence to prove a particular matter.

⁵⁸² [2004] UKHL 43; [2005] 1 AC 264 at paragraph 50 of the judgment

⁵⁸³ Bold type supplied for emphasis.

⁵⁸⁴ Ibid, (note 497) at paragraph 53 of the judgment

⁵⁸⁵ [1999] 4 All ER 801; [1999] 3 WLR 972; [2000] 1 Cr App Rep 275, to be discussed shortly

(2) If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(3) Subsection (4) applies where in accordance with a provision mentioned in subsection (5) a court—

(a) may make an assumption in relation to a person charged with an offence unless a particular matter is proved, or

(b) may accept a fact as sufficient evidence unless a particular matter is proved.

(1) If evidence is adduced which is sufficient to raise an issue with respect to the matter mentioned in subsection (3)(a) or (b) the court shall treat it as proved unless the prosecution disproves it beyond reasonable doubt.”

However, while several sections⁵⁸⁶ similar to section 11(2) of the Act of 2000 were subjected to the general provision in section 118 set out above, section 11(2) was not so subjected. The clear implication of this is that the legislative choice of imposing a legal burden of proof on the accused on questions of membership of a proscribed organisation, as provided in the Act of 2000, was deliberate. As indicated above, Lord Bingham accepted this. However, to his Lordship, the intention of the 1998 Parliament as expressed in section 3(1) of the 1998 Act supersedes the clear intention of the year 2000 Parliament in enacting section 11(2) of the Act of 2000. Thus, in spite of the clear Parliamentary choice of a legal burden of proof, the

⁵⁸⁶ Precisely, ss. 12, 39, 54, 57, 58, 77 and 103

majority, acting pursuant to the interpretative power under section 3(1) of the 1998 Act, felt able to replace that choice with the judicial choice of an evidential burden.

It is submitted that this approach is contrary to the principle of implied repeal, a corollary to the traditional doctrine of parliamentary sovereignty. To hold that the terms of the 1998 Act prevail over the clear terms of the Terrorism Act 2000 appears to be a negation of the traditional concept of parliamentary sovereignty as discussed in chapter two below.

Furthermore, in provisions dealing with burdens of proof, there could be hardly more than two obvious choices to be made. It is either a legal burden is imposed on the defendant requiring him to prove his defence, or an evidential burden is imposed requiring him to proffer evidence sufficient to raise reasonable doubts as to his guilt. Thus, the choice of a legal burden of proof seems by implication, to amount to a deliberate exclusion of the other choice of an evidential burden. In other words, in choosing to impose a legal burden, it is reasonable to accept that Parliament had deliberately rejected the choice of an evidential burden. This contention is even more forceful in *Attorney General's Reference* where, as indicated above, Parliament chose not to subject section 11(2) of the Terrorism Act 2000 to the general provisions of section 118 of the same Act. It is respectfully submitted that the decision in *Attorney General's Reference* amounted to overruling the clear parliamentary choice expressed in section 11(2) of the Terrorism Act 2000. As reportedly argued by counsel for the Attorney General, "section 3 of the 1998 Act cannot be used to overrule decisions which the language of the statute shows have been taken by the legislature on the very point at issue. Nor may section 3 be used to produce a fundamental change in the nature and character of the statutory scheme."⁵⁸⁷

⁵⁸⁷ [2004] UKHL 43, [2005] 1 AC 264, [2005] LLR 198

It is submitted that the difference between the legal effect of the imposition of a legal burden of proof on the defendant, and that of the requirement of an evidential burden only, is one that is substantial and not merely slight. In the first case, the defendant is required to prove particular facts on a balance of probabilities, failing which he may be convicted. In the second case, all that is required is for the defendant to adduce evidence sufficient to create a reasonable doubt as to his guilt, whereupon the onus would revert to the prosecution to eliminate the doubt. The choice of one in preference to the other is most likely to require legislative debates, taking account of competing public policy issues. It is submitted that in such circumstances, a judicial overrule of the legislative choice of a legal burden of proof amounts to an encroachment of Parliament's legislative authority contrary to the traditional concept of parliamentary sovereignty.

In using section 3(1) the way they did in *Attorney General's Reference*, their Lordships have once again relegated parliamentary intention in the Act of 2000 in favour of achieving a Convention-compatible interpretation.

As noted above, the Attorney General urged the House to make a declaration of incompatibility under section 4 of the 1998 Act if it found the statutory provision to be incompatible, rather than take judicial remedial action under section 3(1) of the Act.

Why would the Attorney General prefer a declaration? The answer lies in the fact that there is a significant difference between the two remedies. While a declaration of incompatibility is not binding and does not change the law in the statute book, the practical effect of a section 3(1) judicial remedial action is that thenceforth the statutory provision takes effect as if amended by the judgment. So the law is no longer merely what appears on the statute book;

the law is as modified by the judgment. For this reason, it is submitted that where the use of section 3(1) interpretation would result in a substantial modification of the existing law, judges should refrain from utilising it; instead, they should consider making a declaration of incompatibility under section 4 and leave it to the Government and Parliament to take remedial action pursuant to section 10 and Schedule 2 to the Act

The decision in *Attorney General's Reference* apparently followed dicta pronounced in two previous decisions of the House of Lords, namely, *R v Director of Public Prosecutions, ex parte Kebeline and others*; *R v Director of Public Prosecutions, ex parte Rechach*⁵⁸⁸ and *Regina v Lambert*,⁵⁸⁹ which together indicated that short of an express statement in a statutory provision to the effect that a legal burden of proof imposed on a defendant therein is to apply notwithstanding Convention rights, the courts would be prepared to judicially amend any such provision if found to be in breach of the Convention right to a fair trial, by substituting the legal burden with the requirement of an evidential burden only. The indication from the cases was that in doing so, courts would be less concerned with the intention of Parliament in enacting the offending provision and more concerned with the need to comply with the requirements of a fair trial as provided for by Article 6 of the Convention.

In *Kebeline*,⁵⁹⁰ the accused persons were charged in the Crown Court in connection with terrorism offences under section 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989. Section 16A(1) provided as follows:

⁵⁸⁸ [1999] 4 All ER 801; [1999] 3 WLR 972; [2000] 1 Cr App Rep 275

⁵⁸⁹ [2001] UKHL 37; [2002] 2 AC 545. The facts in both of these cases (i.e. *Kebeline* and *Lambert*) pre-dated the coming into effect of the main provisions of the 1998 Act.

⁵⁹⁰ [2000] 2 AC 326; [1999] 4 All ER 801; [1999] 3 WLR 972; [2000] 1 Cr App Rep 275

“A person is guilty of an offence if he has any article in his possession in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with the commission, preparation or instigation of acts of terrorism to which this section applies....”

Section 16A(3) and (4) provided legal defences for an accused person. However, to avail himself of those defences, the accused person was required to prove the relevant facts on a balance of probabilities. In other words, a legal burden of proof was imposed on the accused person.

Section 16A(3) states: “It is a defence for a person charged with an offence under this section to **prove**⁵⁹¹ that at the time of the alleged offence the article in question was not in his possession for such a purpose as is mentioned in subsection (1) above.”

And section 16A(4) was in the following words:

“Where a person is charged with an offence under this section and it is proved that at the time of the alleged offence – (a) he and that article were both present in any premises; or (b) the article was in premises of which he was the occupier or which he habitually used otherwise than as a member of the public, the court may accept the fact proved as sufficient evidence of his possessing that article at that time unless it is further proved that he did not at that time know of its presence in the premises in question, or, if he did know, that he had no control over it.”

⁵⁹¹ Bold type supplied for emphasis.

At the close of the prosecution's case, instead of opening the defence, counsel addressed court, submitting that the legal burden of proof imposed on the accused by section 16A was incompatible with the presumption of innocence guaranteed by Article 6(2) of the Convention. The trial Crown Court judge accepted this submission.

Consequently, the accused persons' counsel asked the Director of Public Prosecutions (DPP) to reconsider his decision to prosecute. The DPP sought and received legal advice to the effect that section 16A did not breach the presumption of innocence. He therefore attempted to persuade the trial judge to reverse his ruling that the section was incompatible with Article 6(2) of the Convention. But the trial judge rejected the submission and sustained the earlier ruling. Nevertheless, the DPP decided to press on with the prosecution.

Following the DPP's decision to continue with the prosecution, the accused persons instituted judicial review proceedings in the High Court, challenging the lawfulness of the decision. The High Court upheld the argument that section 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989 breached the presumption of innocence guaranteed by Article 6(2) of the Convention and that a conviction under that section would probably be set aside under the 1998 Act. Consequently, it declared that the DPP had acted unlawfully in continuing the prosecutions. The DPP appealed to the House of Lords.

The Lords decided the appeal against the accused persons on grounds not directly relevant to the present discussion. Their Lordships also held that the 1998 Act was not applicable, having not come into force at the relevant time. However, Lord Cooke was inclined to the view that on the natural and ordinary interpretation, section 16A was repugnant to the presumption of innocence guaranteed by Article 6(2) of the Convention. Nevertheless, his Lordship opined

that the repugnancy or incompatibility could be eliminated, pursuant to the interpretative obligation under section 3(1) of the 1998 Act, by construing section 16A “as imposing on the defendant an evidential, but not a persuasive (or ultimate), burden of proof.”⁵⁹²

Lord Cooke’s main reason for so holding appeared to be his perception of the interpretative obligation as representing a strong command from Parliament directing the courts to construe legislation compatibly with the Convention rights.⁵⁹³ Thus, even though the 1989 Parliament intended to impose a legal burden of proof on the defendant under section 16A, the court could substitute it with an evidential burden only, if this were necessary to make the provision compatible with the right to a fair trial. It is submitted that this would be legal reform by judicial means. Indeed, Lord Hope expressly affirmed the role of the judiciary as reformers of the legal system, presumably acting pursuant to their interpretative power under section 3(1) of the 1998 Act.⁵⁹⁴

Lord Cooke’s dictum in *Kebeline* was affirmed in *Lambert*.⁵⁹⁵

In *Lambert*’s case, the appellant was charged with possession of a controlled drug with intent to supply contrary to section 5(3) of the Misuse of Drugs Act 1971 which provided: “Subject to section 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of section 4(1) of this Act.”

⁵⁹² [2000] 2 AC 326; [1999] 4 All ER 801; [1999] 3 WLR 972; [2000] 1 Cr App Rep 275

⁵⁹³ [2000] 2 AC 326; [1999] 4 All ER 801; [1999] 3 WLR 972; [2000] 1 Cr App Rep 275

⁵⁹⁴ [2000] 2 AC 326; [1999] 4 All ER 801; [1999] 3 WLR 972; [2000] 1 Cr App Rep 275

⁵⁹⁵ *Regina v Lambert* [2001] UKHL 37; [2002] 2 AC 545

At the trial, the appellant raised the defence under section 28 of the Misuse of Drugs Act 1971 to the effect that he neither knew nor suspected nor had reason to suspect the nature of the content of the bag that was found on him. The relevant provisions of section 28 were:

“(2) Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

“(3) Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused—

(a) shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but

(b) shall be acquitted thereof—

(i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or

(ii) if he proves that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it

had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any offence to which this section applies."

The appellant was convicted of the offence. On appeal to the Court of Appeal, he contended that section 28 imposed a legal burden of proof on him in that it required him to prove his defence on a balance of probabilities, that the requirement was contrary to the presumption of innocence guaranteed by Article 6(2) of the Convention, and that the conviction was consequently wrong in law. His appeal was dismissed and he further appealed to the House of Lords.

As in *Kebeline's* case, the House held that the 1998 Act was inapplicable to the facts of the case because the conviction occurred before the coming into force of the relevant provisions of the 1998 Act. However, their Lordships made pronouncements (obiter) on the compatibility of the provisions of section 28 of the Misuse of Drugs Act 1971 set out above and the role of section 3(1) of 1998 Act in the interpretation and application of the former.

Their Lordships all agreed that on the ordinary interpretation of section 28 of the 1971 Act, what was imposed on an accused person was a legal burden of proof and not an evidential burden.

A majority of the House⁵⁹⁶ was inclined to the view that although an objective justification for some interference with the presumption of innocence existed, the burden of proof

⁵⁹⁶ With Lord Hutton dissenting.

imposed on an accused person by section 28 of the 1971 Act was disproportionate and therefore incompatible with Article 6(2) of the Convention.⁵⁹⁷

However, their Lordships were also of the view that it would be possible to activate the court's interpretative power under section 3(1) of the 1998 Act to judicially modify the offensive provision in section 28 of the 1971 Act by substituting the legal burden of proof on the accused with an evidential burden only.

An examination of *Lambert's* case indicates that certain factors might have influenced the majority's dicta on the use of section 3(1) to remedy the incompatibility.

In 1972, the Criminal Law Revision Committee produced a report⁵⁹⁸ where they recommended that no legal burden should be placed on an accused person. Burdens on an accused person should be evidential only. Accordingly, they proposed legislation, which would have the following effect:

“...in any case where by virtue of any rule of the common law or of any existing enactment the defence have the burden of proving any matter, the effect will be that, instead of their having to prove it on a balance of probabilities..., they will have only to adduce or elicit some evidence sufficient to raise an issue on the matter and, if they do so, the court or jury will decide by reference to the whole of the evidence whether the prosecution have proved the matter against the accused. If there is no sufficient evidence to raise the issue, the matter will be taken as proved against the accused; but

⁵⁹⁷ Lord Hutton expressed a contrary view.

⁵⁹⁸ Criminal Law Revision Committee (1972). Eleventh Report, Evidence (General). Home Department. **Cmnd 4991**.

if there is sufficient evidence, the prosecution will have the ordinary burden of proving it beyond reasonable doubt. It will be for the court to decide, in accordance with the ordinary principles, whether there is sufficient evidence to raise the issue.”⁵⁹⁹

Secondly, and perhaps more importantly, there was, as indicated earlier, Parliament’s legislative response to the judicial pronouncements in *Kebeline’s* case.⁶⁰⁰ Section 118 of the Terrorism Act 2000 had watered down the legal burden of proof imposed on an accused person under relevant sections of the Act, and had in effect made all such burdens evidential only.

Parliament had made similar provisions in section 53(2) and (3) of the Regulation of Investigatory Powers Act 2000, ensuring that burdens placed on accused persons under that section were evidential rather than legal or persuasive.

It is submitted that, although the issues involved in *Kebeline* and *Lambert* are quite similar to those in *Attorney General’s Reference* as far as the use of section 3(1) was concerned, the dicta in those cases are easier to justify than the decision in the latter case. First, the statutory provisions under consideration in *Kebeline* and *Lambert* pre-dated the enactment of section 3(1) of the 1998 Act. Consequently, it could be argued that in the clash of parliamentary intentions expressed in those provisions and that expressed in section 3(1) of the 1998 Act, the latter would have to prevail by application of the principle of implied repeal. Therefore, the question of a possible judicial challenge to Parliament’s power to legislate as it pleases could not arise. But in *Attorney General’s Reference*, the statutory provision under consideration post-dated section 3(1) of the 1998 Act having been enacted in the year 2000.

⁵⁹⁹ Ibid. See proposals on Clause 8 – Limits of Burden of Proof Falling on Accused.

⁶⁰⁰ See paragraphs 90-94 of the judgment in *Lambert’s* case.

In the circumstance, to hold that the intention expressed in the 1998 Act should prevail over that enacted subsequently seems for all purposes to go against the traditional concept of parliamentary sovereignty.⁶⁰¹

Secondly, as indicated earlier, in *Attorney General's Reference*, a contextual reading of the relevant provisions of the Terrorism Act 2000 suggests quite strongly that the imposition of a legal burden of proof in section 11(2) thereof was deliberate in that, (1) that particular provision was not made subject to section 118 of the Terrorism Act 2000 as other similar provisions in the same Act were made, and (2) since the Terrorism Act 2000 itself came after *Kebedine*, it could reasonably be accepted that Parliament made a deliberate choice of a legal burden rather than an evidential one.

For these reasons, it could be argued that the use of section 3(1) of the 1998 Act in *Attorney General's Reference* amounted to judicial interference in the legislative function of Parliament. It is submitted that given the circumstances, the appropriate decision should have been to make a declaration of incompatibility under section 4 of the 1998 Act.

As stated earlier, a similar approach to the use of section 3(1) in ensuring compliance with the right to a fair trial was adopted in *Secretary of State for the Home Department (Respondent) v MB (FC) (Appellant)*; *Secretary of State for the Home Department (Respondent) v AF (FC) (Appellant)*; *Secretary of State for the Home Department (Appellant) v AF (FC) (Respondent)*,⁶⁰² co-joined appeals.

⁶⁰¹ See generally, chapters 2 and 3 above.

⁶⁰² [2007] UKHL 46. The last two appeals arose from a single case, one being the main appeal and the other a cross-appeal.

Acting pursuant to sections 2 and 3(1)(a) of the Prevention of Terrorism Act 2005, the Secretary of State for the Home Department had issued a non-derogating control order against MB. At a hearing under section 3 of the 2005 Act relating to the control order, the trial judge sustained the order but made a declaration that the procedures under section 3 were incompatible with MB's rights to a fair trial under Article 6(1) of the Convention. On appeal, the Court of Appeal set aside the declaration of incompatibility.

Similarly, the Secretary of State imposed a non-derogating order against AF. At a hearing under section 3(10) of the 2005 Act, the trial judge quashed the control order but dismissed an application by AF for a declaration that the procedures under section 3 were incompatible with Article 6(1) of the Convention. The parties were granted leave to appeal directly to the House of Lords.

In each of these cases, the Secretary of State's application for permission to make the non-derogating orders against the controlled persons under section 3(1)(a) of the 2005 Act was supported by open materials and also by closed materials which were never shown to the controlled persons. In both cases, the material evidence against the controlled persons and upon which the Secretary of State relied for the imposition of the control orders were contained in the non-disclosed materials only.

For example, in MB's case, the trial judge reportedly remarked:

“The basis for the Security Service's confidence is wholly contained within the closed material. Without access to that material it is difficult to see how, in reality MB could

make any effective challenge to what is, on the open case before him, no more than a bare assertion.”⁶⁰³

This non-disclosure of evidence were authorised by statute. The key provisions authorising it were contained in section 3(5) of the Prevention of Terrorism Act 2005, paragraph 4 of the Schedule to the Act, and relevant provisions of the Civil Procedure Rules made pursuant to the Schedule to the Act.

Section 3(5) of the Act authorises the court to consider an application for permission to impose a control order “in the absence”⁶⁰⁴ of the person against whom the order is sought, “without his having been notified of the application”⁶⁰⁵, and “without his having been given an opportunity ... of making any representations to the court.”⁶⁰⁶

Paragraph 4 of the Schedule to the 2005 Act authorises rules of court to be made in relation to control order proceedings. Paragraph 4(2)(a) of the Schedule provides that the rules may permit the non-disclosure of full particulars of the reason for any decision made in relation to the proceedings to the controlled person or his legal representative.

Paragraph 4(2)(b) of the Schedule provides that rules may allow the proceedings to be conducted in the absence of the controlled person.

⁶⁰³ See paragraph 39 of the judgment of Lord Bingham in *MB* [2007] UKHL 46 where he quoted the trial judge’s statement above.

⁶⁰⁴ See section 3(5) (a)

⁶⁰⁵ See section 3(5)(b)

⁶⁰⁶ See section 3(5)(c)

Paragraph 4(3)(b) and (c) direct that the rules **must secure**⁶⁰⁷ that the Secretary of State is allowed to apply to court “for permission not to disclose relevant evidence” to the controlled person, and that such an application is allowed to be made in the absence of the controlled person.

Paragraph 4(3)(d) stipulates that the rules must require the court to grant permission to the Secretary of State for him not to disclose relevant material to the controlled person whenever the court considers that the disclosure would be contrary to the public interest.

In fulfilment of these statutory directives, rule 76.2(2) of the Civil Procedure Rules directs the court to “ensure that information is not disclosed contrary to the public interest.”

Rule 76.29(8) further directs the court to “give permission to the Secretary of State to withhold closed material where it considers that the disclosure of that material would be contrary to the public interest.”

It seems clear from the above, that non-disclosure of relevant evidence is authorised by primary legislation. The provisions were to the effect that whenever the court determined that the disclosure of relevant material would be inimical to the public interest, the court was bound to allow the Secretary of State not only to withhold the evidence from the controlled person, but also to rely on it in support of his case against the controlled person. The granting of the Secretary of State’s application to withhold relevant evidence was therefore mandatory where disclosure would harm the public interest. Reliance on the closed material, if relevant and credible, was also mandatory.

⁶⁰⁷ Bold type supplied for emphasis.

In the light of all the above, the questions that arose for determination by the House of Lords were, first, whether the non-disclosure of material evidence from the controlled persons as authorised by primary legislation, and reliance on same in sustaining the case against them, was incompatible with the right to a fair hearing as guaranteed by Article 6(1) of the Convention, and secondly, whether the court's interpretative power under section 3(1) of the 1998 Act could be used to modify the statutory provisions in a manner that conforms with the right to a fair hearing.

With respect to the first question, the House noted that it involved a balancing of the individual's Convention right to a fair hearing under Article 6 and the interests of national security. While national security is a legitimate aim of legislation, such legislation must be balanced against the rights of the individual to a fair hearing. Accordingly, to be justified and permissible, the inroads made into the right to a fair hearing must be proportionate and must not go beyond what is necessary to achieve the legislative aim. The legislation must contain adequate provisions for the protection of the individual's Convention rights.

It is pertinent to state here that the Prevention of Terrorism Act 2005 made attempts to provide safeguards for the protection of the interests of the controlled person. Paragraph 4(3)(b) of the Schedule to the Act provided that closed material could be shown to a Special Representative appointed for the controlled person under paragraph 7(1) of the Schedule. Paragraph 7(1) further allows the Special Representative to attend and defend the interests of the controlled person in any proceedings in which the controlled person is excluded by law. However, paragraph 7(5) curiously provided that the Special Representative "is not to be responsible to the person whose interests he is appointed to represent."

By a majority of 4-1,⁶⁰⁸ the House decided that the safeguards provided by the 2005 Act and the rules made pursuant to it were inadequate to satisfy the Convention right to a fair hearing. In other words, the House was not satisfied with the balancing act conducted by Parliament. By the legislative scheme, “the judge is precluded from ordering disclosure even where he considers that this is essential in order to give the controlled person a fair hearing.”⁶⁰⁹

The legislative scheme, and in particular, paragraph 4(2)(a) and (3)(d) of the Schedule to the Prevention of Terrorism Act 2005, and rule 76.29(8) of the Civil Procedure Rules, were therefore incompatible with the right to a fair hearing under Article 6(1) of the Convention. This would be the case in circumstances where the open material was grossly insufficient to support the case against the controlled person, and all the material evidence against him were contained in the closed material only.

With respect to the second question, the majority decided that it was possible to judicially modify the offending provisions of the legislative scheme by use of the court’s interpretative power under section 3(1) of the 1998 Act. Allowing the judge to refuse the application to withhold evidence in any case where non-disclosure would breach the controlled person’s rights to a fair hearing would satisfy Article 6(1) of the Convention. In that case, if the judge determined that disclosure was inimical to the public interest, he would not order disclosure but he would be able to exclude the material and direct that the Secretary of State should not rely on it in support of the case against the controlled person.

⁶⁰⁸ With Lord Hoffman dissenting.

⁶⁰⁹ Per Baroness Hale at paragraph 69 of the judgment

This seems to nullify the mandatory provisions in the Prevention of Terrorism Act 2005 requiring the judge to allow the use of non-disclosed evidence in circumstances where disclosure would harm the public interest. The effect of the decision is that the judge has been given considerable discretionary powers to decide on the admissibility of non-disclosed evidence. In particular, he has been empowered to refuse reliance on non-disclosed evidence where such reliance might lead to a breach of the right to a fair trial. It is submitted that this goes contrary to the mandatory language used in the 2005 Act

Indeed, Lord Bingham seriously questioned the propriety of using section 3(1) of the 1998 Act in the circumstances of these appeals. His reason was that modifying the legislative scheme in the manner stated above would amount to a “weakening of the mandatory language used by Parliament” and that such modification “would very clearly fly in the face of Parliament’s intention.”⁶¹⁰ In the end however, his Lordship declined to press the point and instead, joined the majority in judicially modifying the offending provisions.

Both the Terrorism Bill and the Prevention of Terrorism Bill⁶¹¹ contained statements of compatibility made pursuant to section 19(1)(a) of the 1998 Act, expressing the Home Secretary’s view that the provisions therein were compatible with the Convention rights. While it may be argued that such statements could support a strong presumption that no breach of Convention rights was intended by the Government, it is submitted that they should not enjoy a better standing than the clear and unequivocal language used in the statute. It is the language used in the statute that best conveys the intention of Parliament in enacting the statute under consideration.

⁶¹⁰ See paragraph 44 of the judgment

⁶¹¹ Which became the Terrorism Act 2000 and the Prevention of Terrorism Act 2005 respectively

These appeals⁶¹² are a classic example of the way in which the House of Lords now views its obligations under the 1998 Act to protect the Convention rights. The cases tend to indicate that the clear intention of Parliament in enacting the legislation under consideration is accorded a relatively insignificant role in the interpretative process under section 3(1) of the 1998 Act. As could be seen in chapter 3 above, traditionally, the main aim of statutory interpretation is the ascertainment of the intention of Parliament in enacting the legislation under consideration. If the ascertained intention is unambiguous and does not lead to an absurd result, the doctrine of parliamentary sovereignty demands that the court obey and apply that intention irrespective of any breach of the Convention rights. However, it would appear that section 3(1) of the 1998 Act has enabled judges to pay less attention to parliamentary sovereignty and more attention to the need to protect the Convention rights.⁶¹³

It has to be noted at this juncture that the judges do recognise that there are limits to the extent to which they may utilise their interpretative power under section 3(1) of the 1998 Act in construing legislation compatibly with the Convention rights. However, as will be demonstrated shortly, it would appear that refusal in some cases to use section 3(1) in judicially rectifying primary legislation found to be incompatible with the Convention rights is motivated more by factors other than a real concern that the doctrine of parliamentary

⁶¹² Namely, *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No. 4 of 2002)* [2004] UKHL 43; [2005] 1 AC 264 and *Secretary of State for the Home Department (Respondent) v MB (FC) (Appellant); Secretary of State for the Home Department (Respondent) v AF (FC) (Appellant); Secretary of State for the Home Department (Appellant) v AF (FC) (Respondent)* [2007] UKHL 46

⁶¹³ As part of the 2008 Eldon Lecture Series organised by the School of Law, Northumbria University, Baroness Hale, who was part of the majority in *MB's* case ([2007] UKHL 46) delivered a lecture titled "Terrorism and Human Rights" on 28 February 2008. On that occasion, this writer had the opportunity of asking Her Ladyship if she had any concerns about parliamentary sovereignty when she took the decision (in *MB's* case) to use section 3(1) of the Human Rights Act to modify the mandatory statutory provisions allowing the use of non-disclosed evidence. Her reply was simply that she did, but that a precedent had already been set by *R v A* and other cases in that line. Furthermore, as her Ladyship stated at paragraph 71 of her judgment in *MB's* case [2007] UKHL 46, she recalled that in *R (Hammond) v Secretary of State for the Home Department* [2005] UKHL 69, [2006] 1 AC 603, the Government itself invited the House to take a similar step.

sovereignty may be breached in the process. For example, a contextual examination of such cases indicate that factors such as the apparent lack of institutional competence on the part of the judiciary to deal with the issue at hand, or even the character of the legal challenge itself, may be a reason for declining to use section 3(1) to achieve compatibility with the Convention rights. It would be argued that, despite numerous judicial statements (in decisions in which the courts decline to use section 3(1) of the 1998 Act) tending to indicate an avowed reverence for the doctrine of parliamentary sovereignty, the real reason is often the factors mentioned above.

A good example of such a case is *International Transport Roth GmbH and others v Secretary of State for the Home Department*⁶¹⁴ where the principle was stated that it would be inappropriate to use section 3(1) if doing so would involve the court in substantially re-writing the entirety of a legislative scheme.

The issue was whether a penalty scheme created under section 32 of the Immigration and Asylum Act 1999 was incompatible with Article 6 of the Convention, and if incompatible, whether the court could activate its interpretative power under section 3(1) of the 1998 Act to modify the offending provisions to make them compatible with the Convention right.

The Secretary of State was empowered under the scheme to impose a fixed penalty of £2,000 on the owner, hirer and driver of any transport carrier in whose carrier a clandestine entrant defined in section 32(1) of the 1999 Act was found. They were to be liable to pay the fixed sum unless they could avail themselves with a relevant defence under section 34 of the Act.

⁶¹⁴ [2002] EWCA Civ 158; [2003] QB 728

The defences included duress, lack of actual or constructive knowledge, and the operation of an effective system for preventing the carriage of clandestine entrants.

Groups of claimants who were affected by the scheme took out proceedings challenging the lawfulness of the scheme. In some of the cases, the clandestine entrants were discovered by the drivers only when they were already on the highway; and they would not have been made to pay the fixed penalty if not for the fact that they themselves reported the matter to the authorities.

The trial judge held *inter alia*, that the penalty scheme was incompatible with Article 6 of the Convention. The Home Secretary appealed to the Court of Appeal.

On the Convention point, the majority⁶¹⁵ judged the scheme to be incompatible with Article 6 of the Convention on the ground that the fixed penalty was inflexible and took no account of mitigating circumstances, and more importantly, the scheme made no provision for the penalty to be determined by an independent tribunal.

However, upon the defendants' invitation to utilise its interpretative power under section 3(1) of the 1998 Act to construe the scheme in a manner that would eliminate any unfairness and thus bring it in conformity with Article 6 of the Convention, the Court of Appeal stated that the circumstances made this option impossible. According to Lord Justice Brown:

“...it appears to me quite impossible to recreate this scheme by any interpretative process as one compatible with Convention rights. As I have more than once endeavoured to explain, the troubling features of the scheme are all inter-linked: to achieve fairness would require a radically different approach. Mr. Barling, of course, invokes section 3 only as his final fall-back position. But in asking us to apply it he is,

⁶¹⁵ Simon Brown and Jonathan Parker LL.J., (Laws, LJ dissenting). See paragraph 24 of the judgment.

in my judgment, necessarily inviting us to turn the scheme inside out, something we cannot do. As the authorities clearly dictate, the court's task is to distinguish between legislation and interpretation, and confine itself to the latter. We cannot create a wholly different scheme (perhaps of the sort envisaged by Sullivan J below) so as to provide an acceptable alternative means of immigration control. That must be for Parliament itself. As Lord Lester of Herne Hill pointed out, were we ourselves to create a fresh scheme purportedly under section 3, then indeed we should be failing to show the judicial deference owed to Parliament as legislators.”⁶¹⁶

It is clear from the above that the so-called impossibility arose because of the peculiar circumstances of the case. The features that were adjudged incompatible were not one, but several. These features were all “inter-linked” and presumably inseparable. To judicially modify them in bits would not have been appropriate. To achieve compatibility, the “whole” of the scheme would have had to be re-written. That is not a job for the judiciary. That is the job of the draftsman and ultimately Parliament. Re-writing substantial parts of a statute goes beyond construing the statute in accordance with section 3(1). Clearly, in these circumstances, it can hardly be denied that it is inappropriate to judicially modify the scheme by use of section 3(1).

Thus, the impossibility did not arise primarily because of a concern for parliamentary sovereignty. It arose because the circumstances made it inappropriate for judicial remedial action to be taken. The appropriate remedial action in the circumstances was a legislative one.

This case is authority for the proposition that where a section 3(1) interpretation would involve re-writing an entire legislative scheme or a substantial part of it, it would be inappropriate to remedy the incompatibility by judicial means. In such circumstances, the right option is a legislative one. Parliament should be allowed to make the necessary amendments. It is not a case of parliamentary sovereignty trumping Convention rights. The

⁶¹⁶ At paragraph 66 of the judgment.

case in no way detracts from the immense power available to the court under section 3(1) to modify primary legislation for the purpose of making it Convention-compliant.

There was no suggestion that the court could not change the meaning and effect of primary legislation pursuant to the interpretative obligation under section 3(1) of the 1998 Act. What the case indicated was that the court was ill-equipped to re-write the entirety of the legislative scheme. No such wholesale re-writing was necessary in cases such as *R v A*, *Ghaidan v Mendoza*, *Attorney General's Reference (N0. 4 of 2002)* and *MB*. The decision indicated that section 3(1) does not empower the courts to embark on an exercise of wholesale revision and amendment of statutes. Such an exercise would certainly require extensive legislative debates.

Similar reasons accounted for the refusal of the House of Lords to utilise the interpretative power under section 3(1) in *Re S (Minors) (Care Order: Implementation of Care Plan); In Re W (Minors)*(co-joined appeals),⁶¹⁷ even though pronouncements in the case tended to indicate that their Lordships were concerned to avoid an interpretation that would be contrary to the parliamentary intention expressed in the statute under consideration in the appeals.

The appeals arose from two cases where the trial judges respectively made final care orders in respect of certain minors pursuant to the provisions of the Children's Act 1989. In the first case, the local authority concerned failed to implement the care plan prepared pursuant to the care order. Amongst others, the plan required the local authority to work with the mother of the children with a view to reuniting her with the children. The mother appealed, contending that the trial judge should have made an interim order only, instead of a final order. In the

⁶¹⁷ [2002] UKHL 10; [2002] 2 AC 291.

second case, the final care order was made despite the fact that vital aspects of the care plan remained uncertain. The parents appealed contending that the judge should not have made a final care order in the circumstances.

In the course of the appeals, the Court of Appeal observed and criticised certain elements of the Children's Act 1989. While the Act allowed courts to make final care orders in respect of children in need of care and consequently remove these children from their parents and into the parental care of local authorities, it provided no adequate remedies to both the children and their parents in a situation where the local authority concerned failed to discharge or properly discharge its parental responsibilities in accordance with the approved care plan. The Court of Appeal found that such a situation could result in an infringement of the Convention rights of the children and their parents under Article 8.⁶¹⁸ Courts had no way of monitoring the care plan in order to ensure that the local authority properly discharged its parental responsibilities. The Court of Appeal felt that this was not right. According to Hale, LJ:⁶¹⁹

“Where elements of the care plan are so fundamental that there is a real risk of a breach of Convention rights if they are not fulfilled, and where there is some reason to fear that they may not be fulfilled, it must be justifiable to read into the Children Act 1989 a power in the court to require a report on progress . . . the court would require a report, either to the court or to the guardian ad litem (in future to CAFCASS) who could then decide whether it was appropriate to return the case to court . . . (When) making a care order, the court is being asked to interfere in family life. If it perceives that the consequence of doing so will be to put at risk the Convention rights of either the parents or the child, the court should be able to impose this very limited requirement as a condition of its own interference.”⁶²⁰

To remedy this perceived shortcoming in the Children's Act 1989, the Court of Appeal, purportedly acting under section 3(1) of the 1998 Act, introduced a new procedure into the

⁶¹⁸ That is the right to respect for private and family life.

⁶¹⁹ As she then was.

⁶²⁰ Quoted by Lord Nicholls at paragraph 33 of the judgment ([2002] UKHL 10; [2002] 2 AC 291)

working of the 1989 Act. This new procedure involved “starring” essential milestones in an approved care plan when a care order is to be issued by the court. After a care order had been issued, if the local authority concerned failed to achieve a “starred” milestone within a given time, the local authority would be obliged to inform the guardian of the child. Following this, the guardian or the local authority could then apply to the court for further directions. The Court of Appeal also formulated guidance enabling judges to exercise wider discretions in making interim orders and in deferring the making of final care orders.

Essentially, what the Court of Appeal did by the introduction of this new procedure was to give to the courts supervisory powers enabling them to monitor the implementation of an approved care plan.

The local authority in the first case, as well as the Secretary of State for Health felt that the Court of Appeal erred in introducing the procedure in that the supervisory jurisdiction now conferred on the courts is inconsistent with fundamental features of the Children’s Act 1989. They therefore appealed to the House of Lords.

In delivering its judgment, the House identified what it termed “a cardinal principle” of the Children’s Act. This is that there is a clear division of responsibility between local authorities and courts in the implementation of the Children’s Act. Under the Act, the court has the power to make a care order. However, once the care order has been made, it becomes the duty of the designated local authority to take the child into care and implement the care plan. Once the care order has been made, the court has no powers to interfere with the implementation of the care plan or in the way the local authority goes about its parental responsibility towards the child.

The House observed that this principle was quite deliberate as it represented a change in the law. Previously, courts had power to exercise some supervision over local authorities with respect to children being cared for by those local authorities. This was done by virtue of the court's wardship jurisdiction. For various reasons, it was felt that court supervision was undesirable and that it was better to leave all matters of care of children entirely to local authorities who were more suited to manage and cater to the day-to-day needs of children under care. Thus, section 100(2) of the Children's Act 1989 provided:

“(2) No court shall exercise the High Court's inherent jurisdiction with respect to children—

- (a) so as to require a child to be placed in the care, or put under the supervision, of a local authority;
- (b) so as to require a child to be accommodated by or on behalf of a local authority;
- (c) so as to make a child who is the subject of a care order a ward of court; or
- (d) for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.”

The principle that courts should not interfere with the way in which local authorities carry out their parental responsibilities pursuant to a care order is therefore of vital importance.

Bearing this principle in mind, the House of Lords overruled the Court of Appeal's introduction of the "starring" system. The House held that the system departed from the cardinal principle of the Act as stated above. It was therefore an unacceptable use of the court's interpretative power under section 3(1) of the 1998 Act. As Lord Nicholls stated:

"...a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate."⁶²¹

Lord Nicholls further expressed the view that whenever a court considers making use of section 3(1) of the 1998 Act in the interpretation and application of legislation, it should be able to identify the particular provision in the legislation that offends the Convention rights. This makes sense because it is in relation to a specific provision that the court is often called upon to construe legislation pursuant to section 3(1) of the 1998 Act. The isolation of the offending provision helps to ensure that "the court does not inadvertently stray outside its interpretative jurisdiction."⁶²²

Neither the appellants before the Court of Appeal, nor the Court of Appeal itself, was able to identify and isolate the provisions that they perceived to be capable of contravening the Convention rights. Indeed, Hale, LJ, (as she then was) stated that "the problem is more with what the Act does not say than what it does."⁶²³

Clearly, the decision of the House of Lords stands on four major pillars. The first is that the supervisory scheme introduced by the Court of Appeal was not sanctioned by Parliament.

⁶²¹ See paragraph 40 of the judgment, *ibid.* For the "practical ramifications" which the "starring" system might be saddled with, see paragraph 43, *ibid.*

⁶²² Per Lord Nicholls, *ibid.*, at paragraph 41.

⁶²³ *Re S, Re W* [2001] H.R.L.R. 50, at paragraph 50 of the judgment.

Secondly, the scheme departed from a fundamental feature of the Children's Act. Thirdly, no specific provisions of the Children's Act could be isolated for the purpose of subjecting it a section 3(1) interpretation. The last but by no means the least is that the scheme had important practical repercussions for which the courts were not equipped to evaluate and deal with.

The strongest of these four pillars would appear to be the third, and, even more importantly, the fourth. As has been shown in earlier parts of this chapter, the courts have in certain instances been able to read into primary legislation provisions that were not sanctioned by Parliament.⁶²⁴ Similarly, they have also been able to depart from important features of primary legislation if that were necessary to make the legislation Convention-compatible. For example, in *MB*, the deliberateness on the part of Parliament, indicated by the mandatory language of paragraph 4(3)(d) of the Schedule to the Prevention of Terrorism Act 2005, to allow the use of non-disclosed evidence as provided in the Act, did not prevent the House of Lords from using section 3(1) of the 1998 Act in a manner that resulted in a substantial departure from the legislative intent expressed in the 2005 Act, in order to achieve compatibility with the Convention right to a fair hearing.⁶²⁵

However, the available case law on the use of section 3(1) has shown that in each case where the courts have utilised their interpretative power, they were able to identify the particular statutory provisions that they held to be incompatible with the Convention rights. And it is those identified provisions that were construed pursuant to section 3(1). Thus, the decision in the instant case might have been different if it were possible for the court to isolate an offending provision and construe it compatibly with the Convention rights. In a majority of

⁶²⁴ See for instance, the cases of *R v A*, and *Ghaidan v Mendoza*

⁶²⁵ [2007] UKHL 46

the cases discussed above, compatibility was achieved by inserting rectifying provisos into identified offending sections of the relevant statute.

Nevertheless, what appears to have weighed most heavily on the minds of their Lordships is the fact that the scheme had serious practical implications both in terms of administrative work and departmental expenditure. The implications are ones that would require policy issues to be considered, deliberated upon and decided. These are things for which the courts are not equipped.

The case therefore had more to do with the appropriateness of judicial amendment in light of its peculiar circumstances. The fall-out of such judicial amendment is something that the courts were not well-placed to deal with. The case was not a departure from previous decisions such as *R v A* where the courts have been able to depart from the enacted intention of Parliament.

The same principle was adopted in *Bellinger v Bellinger*.⁶²⁶ Similar to *Re S*, *Re W*⁶²⁷ the House held that section 3(1) of the 1998 Act was not to be used to effect a major change in the law which may have far-reaching ramifications for which the courts were not equipped.

In that case, Mrs. Bellinger, the appellant, was a transsexual who was originally classified and registered correctly as a male at birth in 1946. In 1981, she completed gender-reassignment treatment and effectively had her sex changed from male to female. In the same year, now living as a woman, she married a man named Bellinger. The marriage was

⁶²⁶ [2003] UKHL 21; [2003] 2 AC 467; [2003] 2 All ER 593.

⁶²⁷ [2002] UKHL 10; [2002] 2 AC 291

purportedly conducted pursuant to the provisions of the Matrimonial Causes Act 1973. Following the marriage, the couple lived together as husband and wife.

Mrs. Bellinger's sex change was known to, and indeed had the support of, her husband. There was therefore no deceit involved in the case.

Presumably, Mrs. Bellinger knew of the provisions of section 11(c) of the Matrimonial Causes Act 1973 and was understandably concerned about the validity of the marriage. Section 11(c) declared a marriage to be void if "the parties are not respectively male and female."

In order to save her marriage, Mrs. Bellinger filed legal proceedings seeking a declaration that the marriage was valid from inception on the ground that at the time of the marriage, she had become a "female" within the meaning of section 11(c) of the 1973 Act.

Both the trial court and the Court of Appeal rejected Mrs. Bellinger's contention. Following previous decisions,⁶²⁸ both courts had held that the sex of a person as determined by the chromosomal, gonadal and genital tests at birth could not be changed for purposes of marriage under the Matrimonial Causes Act 1973. In the result, Mrs. Bellinger's sex change was legally unrecognisable for purposes of marriage under the 1973 Act.

Mrs. Bellinger appealed to the House of Lords. In the House, she added an alternative remedy to the declaration sought in the courts below. Should the Lords agree with the courts below that the Matrimonial Causes Act 1973 did not recognise sex change for purposes of marriage

⁶²⁸ See *Corbett v Corbett* [1970] 2 All ER 33

under the Act, a declaration should be made that the non-recognition infringed her Convention rights to respect for family life under Article 8 as well as the right to marry under Article 12.

After reviewing the available case law on the issue of transsexuals in the context of marriage, the House accepted the decision of Ormrod, J in *Corbett v Corbett*⁶²⁹ as representing the present state of the law. In that case, Ormrod, J had held that for purposes of marriage, the sex of a party to the marriage should be determined by the chromosomal, gonadal and genital tests carried out at birth. For this purpose, any intervening factor, for instance, sex change, should not be taken into account. In other words, for purposes of marriage, the sex determined at birth in accordance with the three tests mentioned above, remained constant and unchangeable throughout a person's lifetime. Accordingly, the House held that Mrs. Bellinger could not be regarded as a "female" under section 11(c) of the Matrimonial Causes Act 1973.

The House then proceeded to consider the European viewpoint on the issue whether the non-recognition of Mrs. Bellinger's sex-change for the purposes of marriage amounted to a violation of her Convention rights as stated above.

Initially, the view of the European Court has been that the application of the *Corbett* tests⁶³⁰ did not amount to a violation of the rights under Articles 8 or 12 of the Convention.⁶³¹ This was mainly on the ground that the issue came within the purview of a State's margin of appreciation. But with the increased social acceptance of transsexuality, the European Court became critical of the continued failure of the United Kingdom to give legal recognition to

⁶²⁹ [1970] 2 All ER 33

⁶³⁰ In reference to the decision in *Corbett v Corbett* [1970] 2 All ER 33.

⁶³¹ *Rees v United Kingdom* (1986) 9 EHRR 56; *Cossey v United Kingdom* [1993] 2 FCR 97

transsexuals in relation to marriage.⁶³² Then, in the case of *Goodwin v United Kingdom*,⁶³³ the European Court finally decided that the failure to give legal recognition to the new status acquired by persons who had undergone sex change was no more acceptable. It ruled that such non-recognition was a violation of relevant Convention rights.

Goodwin was a post operative male-to-female transsexual. She applied to be treated as a female for national insurance purposes. She also intended to marry her male partner. However, the domestic law of the United Kingdom permitted neither of these because Goodwin was originally correctly registered as a male at birth and it was immaterial that she had undergone sex change. She therefore applied to the European Court for remedy, contending that United Kingdom's failure to give her sex change legal recognition infringed her Convention rights under Articles 8 and 12.⁶³⁴

Presumably acting pursuant to section 2(1)(a) of the 1998 Act, the House of Lords accepted the *Goodwin* decision and accordingly held that the non-recognition of Mrs. Bellinger as a female for purposes of marriage amounted to an infringement of her Convention rights. This point was even expressly conceded on behalf of the Lord Chancellor and was not in dispute.⁶³⁵

The next issue that the House had to determine was whether, acting under section 3(1) of the 1998 Act, the word, "female" as it appeared in section 11(c) of the Matrimonial Causes Act 1973 could be given an extended meaning to the effect that a person correctly registered at birth as a man could later acquire the female sex and become regarded as a female for the

⁶³² *Sheffield and Horsham v United Kingdom* [1998] 3 FCR 141

⁶³³ [2002] 2 FCR 577

⁶³⁴ *Goodwin's* case was decided by the European Court after the decision of the Court of Appeal in *Bellinger v Bellinger*.

⁶³⁵ See paragraph 27 of the judgment ([2003] UKHL 21; [2003] 2 AC 467; [2003] 2 All ER 593)

purpose of marriage to a male partner. In that way, the repugnant aspect of section 11 (c) of the 1973 Act would have been eliminated.

Their Lordships unanimously decided that it would be inappropriate to use section 3(1) of the 1998 Act to judicially modify the offending provision. According to Lord Nicholls, doing so

“...would represent a major change in the law, having far-reaching ramifications. It raises issues whose solution calls for extensive inquiry and the widest public consultation and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced. The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject.”⁶³⁶

Several reasons appear to account for the refusal of the House of Lords to judicially modify the offending provision. First, their Lordships seemed to feel that the case was too *Bellinger-specific* to give a ruling of general application. “Much uncertainty surrounds the circumstances in which gender reassignment should be recognised for the purposes of marriage.”⁶³⁷ Gender reassignment is a long process and involves a variety of treatments and operations. The difficult question would always be at which point could a person be regarded as having fully changed from one sex to the other in order to save the marriage from invalidity under section 11(c) of the Matrimonial Causes Act 1973.

Secondly, as Lord Nicholls stated, “the recognition of gender reassignment for the purposes of marriage is part of a wider problem which should be considered as a whole and not dealt

⁶³⁶ See paragraph 37 of the judgment, *ibid.* See also paragraphs 39-49, *ibid.*, for further particulars of the reasons adduced by Lord Nicholls as to why it is inappropriate in the circumstances to judicially modify the offending provision of the Marriage Act 1973.

⁶³⁷ Paragraph 39 of the judgment, *ibid.*

with in a piecemeal fashion.”⁶³⁸ The issue affects virtually every aspect of legal regulation; from family law, criminal law, and employment law to housing law. The appropriate thing to do therefore would be to enact legislation that would take into consideration all the implications just mentioned.

Thirdly, it should be recalled that in *Goodwin’s* case, even though the European Court denounced the failure of the United Kingdom to provide for the legal recognition of post-operative transsexuals, it conceded a margin of appreciation to the Contracting States as to the means of achieving the necessary legal recognition. This factor must have played a prominent part in the House’s decision to leave it to Parliament to devise the appropriate means by which legal recognition can be accorded to transsexuals.

Lastly, in reaction to the decision in *Goodwin’s* case, the Government had openly acknowledged that the failure to give legal recognition to transsexuals was incompatible with the Convention rights. Accordingly, it had announced its intention to introduce legislation that would provide for the legal recognition of transsexuals and also deal with concomitant matters.⁶³⁹ This fact, taken together with all the other factors mentioned above, made it absolutely inappropriate for the courts to dabble into this complex matter for which they were not well suited. In the circumstances, it was better to leave it to the Government, and ultimately to Parliament, to deal with the problem in the best manner they thought fit.

In *Bellinger*, the inability of the House to utilise the interpretative power under section 3(1) of the 1998 Act was not due to the language used in the Matrimonial Causes Act 1973. Neither

⁶³⁸ Paragraph 45 of the judgment, *ibid*.

⁶³⁹ Indeed, the specific fact that the Government had reconvened a Working Group to study the issue of gender reassignment with a view to enacting comprehensive legislation appeared to have substantially influenced the decision not to resort to a section 3(1) interpretation in the case.

were their Lordships concerned that the resultant interpretation would be contrary to the parliamentary intention expressed in the 1973 Act. The major reason appeared to be a lack of institutional competence on the part of the judiciary to deal with the complex issues that would arise from a section 3(1) interpretation. Thus, in *Ghaidan v Mendoza*, the House⁶⁴⁰ was able to utilise section 3(1) the way it did because no such ramifications (as pointed out by Lord Nicholls in *Bellinger*) arose.

Bellinger indicates that circumstances peculiar to a given case might make it inappropriate to exercise the interpretative power contained in section 3(1) of the 1998 Act even though it might be quite possible in principle to use it to achieve compatibility.

As indicated above, it would appear that the nature of the legal challenge in a case might well be a reason for declining to use section 3(1) of the 1998 Act to judicially modify incompatible legislation. The case of *R (on the application of Anderson) v Secretary of State for the Home Department*⁶⁴¹ illustrates this.

Anderson concerned the role played by the Secretary of State in the fixing of the tariff⁶⁴² that a mandatory life prisoner must serve before he qualified to be considered for parole under section 29 of the Crime (Sentences) Act 1997.⁶⁴³

In practice, life imprisonment does not necessarily mean imprisonment for the rest of the prisoner's life. Persons who are sentenced to mandatory life imprisonment are entitled, like all other categories of prisoners, to be considered for parole some time in the course of their

⁶⁴⁰ By a majority of 4-1

⁶⁴¹ [2002] UKHL 46; [2002] 4 All ER 1089; [2003] 1 Cr App Rep 523. Hereafter simply called *Anderson*

⁶⁴² This refers to the minimum term of imprisonment to be served by a life prisoner.

⁶⁴³ Later repealed by the Criminal Justice Act 2003.

imprisonment. To this end, section 29 of the Crime (Sentences) Act 1997 provided as follows:

“(1) If recommended to do so by the Parole Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a life prisoner who is not a discretionary life prisoner.

(2) The Parole Board shall not make a recommendation under subsection (1) above unless the Secretary of State has referred the particular case, or the class of case to which that case belongs, to the Board for its advice.”

In essence, what these provisions mean is that the prisoner cannot be considered for parole except with the consent of the Secretary of State. This is so since the Parole Board has no power to make any recommendation for the release of the prisoner unless the Secretary of State has referred the case to it.

In practice, before the Secretary of State refers a case to the Parole Board, he satisfies himself that the prisoner had served an appropriate term in prison to satisfy the requirements of deterrence and retribution. In determining the appropriate minimum term to be served, before the prisoner's case is referred to the Parole Board, the Home Secretary takes a number of factors into consideration. These factors may include the gravity of the offence, the interests of the victim, public confidence in the criminal justice system as well as the criminal record of the prisoner.

No doubt, these are matters that the courts ordinarily deal with when considering imposing a sentence after conviction. It was not surprising therefore that the practice was adopted whereby, the trial judge who imposes the life sentence recommends the minimum term that must be served by the life prisoner before he qualifies to be considered for parole. The judge did that taking into consideration all relevant factors mitigating or aggravating the offence.

The recommendation of the trial judge is then passed on to the Lord Chief Justice who adds his own recommendation and then forwards the case to the Secretary of State for his decision. As section 29 of the Crime (Sentences) Act 1997 makes clear, the decision to refer the case to the Parole Board for their consideration is his to make. Therefore, the Secretary is free either to accept the recommendation of the trial judge or to reject it and fix a different minimum term to be served by the prisoner before his case is referred to the Parole Board.

In substance therefore, the provisions of section 29 of the 1997 Act allows the Secretary of State (rather than the courts) to determine the minimum term that a mandatory life prisoner must serve before he qualifies for consideration for parole.

Mr. Anderson was a mandatory life prisoner. Both the trial judge and the Lord Chief Justice recommended that the minimum term he should serve in prison be 15 years. However, the Secretary of State rejected this recommendation and fixed a term of 20 years. That meant that irrespective of any mitigating factors that might have been found by the trial judge, Anderson could not be considered for parole until he had served at least 20 years in prison.

When the judicially recommended tariff of 15 years was nearing completion, Anderson applied for judicial review of the Home Secretary's decision of increasing the tariff by 5 years. He lost both at the Divisional Court and the Court of Appeal.

Before the House of Lords, the issue arose as to whether section 29 of the Crime (Sentences) Act 1997, which in substance enabled the Secretary of State to fix the minimum term, was incompatible with the prisoner's right under Article 6(1) of the Convention to have his sentence imposed by an independent and impartial tribunal. If incompatible, a further issue for determination was whether section 3(1) of the 1998 Act could be used to modify the offending provision in a manner that removed the incompatibility.

On the first issue above, the House of Lords had no difficulty in holding that the Home Secretary's role in fixing the tariff was incompatible with the right of the prisoner to have his sentence imposed by an independent and impartial tribunal. This decision was in line with the decision of the European Court in *Benjamin v United Kingdom*⁶⁴⁴ where the Home Secretary's role was criticised.

On the question whether section 3(1) of the 1998 Act could be used to remedy the incompatibility, the House ruled that it was not possible. Their Lordships decided that Section 29 of the 1997 Act clearly conferred on the Secretary of State the power to refer a mandatory life sentence prisoner's case to the Parole Board. By that section, whether and when the Secretary decides to refer the case to the Parole Board is entirely up to him. He may decide not to refer the case to the Parole Board for the rest of the life of the prisoner. He may decide to refer it just after conviction. He may do either of these and he would be perfectly within the law.

⁶⁴⁴ (2000) 13 BHRC 287. See section 2(1)(a) of the 1998 Act on the statutory direction for courts to take account of relevant judgements of the European Court.

Furthermore, even where the Home Secretary decided to refer the case to the Parole Board, he was not bound by law to accept the recommendation of the Board even if the recommendation were in favour of releasing the prisoner on licence.

On the whole, it is clear that as far as mandatory life prisoners were concerned, Parliament intended that the length of time they should serve in prison must be left in the final analysis to the Secretary of State to determine for himself. This position becomes even clearer when section 28 of the Crime (Sentences) Act 1997 is contrasted with section 29 of the same Act. Section 28 provided for the release of discretionary life prisoners and the powers exercisable by the Secretary of State therein are distinctively less absolute than those exercisable by him under section 29. This, according to the House, was deliberate on the part of Parliament.

The role of the Secretary of State under section 29 was held to be too pervasive to be ignored. Therefore,

“to read s 29 as precluding participation by the Home Secretary, if it were possible to do so, would be judicial vandalism: it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by s 3 of the 1998 Act.”⁶⁴⁵

For Lord Steyn, following such a course “would not be interpretation but interpolation inconsistent with the plain legislative intent to entrust the decision to the Home Secretary, who was intended to be free to follow or reject judicial advice.”⁶⁴⁶

⁶⁴⁵ Per Lord Bingham, at paragraph 30 of the judgment ([2002] UKHL 46; [2002] 4 All ER 1089; [2003] 1 Cr App Rep 523)

⁶⁴⁶ Paragraph 59 of the judgment, *ibid.*

And for Lord Hutton, the House would be engaging “in the amendment of a statute” if it were to transfer the right to decide on the length of the tariff period from the Home Secretary to the judiciary.⁶⁴⁷

The decision in *Anderson* appears to contradict the decision in *R v A*. The House seemed to have based its refusal to use section 3(1) of the 1998 Act mainly on the ground that the resulting interpretation would be contrary to the intention of Parliament in enacting section 29 of the Crime (Sentences) Act 1997. The perceived difference in approach in the two cases is even more illuminated by the similarity of the legal issues involved in them. One argument has been that in *R v A*, the House of Lords felt able to utilise section 3(1) of the 1998 Act because the issue of fair trial was a subject-matter “within the traditional decision-making expertise of the courts.”⁶⁴⁸ However, it is observed that the issue of sentencing involved in *Anderson* also fell within the same class. Traditionally, sentencing has been a judicial function. Thus, Danny Nicol has argued that the decision represents a retreat from *R v A*.⁶⁴⁹

However, subsequent House of Lords decisions seem to indicate that the House has not retreated (and would probably not retreat) from the maximal utilisation of its interpretative power under section 3(1) of the 1998 Act in appropriate cases.⁶⁵⁰

The explanation for *Anderson* lies perhaps in the very nature of the appeal itself. The case was essentially a challenge to the executive action of the Secretary of State in fixing the tariff

⁶⁴⁷ Paragraph 81 of the judgment, *ibid*.

⁶⁴⁸ Kavanagh, A. (2004). "Statutory Interpretation and Human Rights after *Anderson*: a more contextual approach." *Public Law*: 537-545.

⁶⁴⁹ Nicol, D. *Ibid*. "Statutory Interpretation and Human Rights after *Anderson*." 274-282.

⁶⁵⁰ See for example *Ghaidan v Mendoza* [2004] UKHL 30, and *Secretary of State for the Home Department (Respondent) v MB (FC) (Appellant)*; *Secretary of State for the Home Department (Respondent) v AF (FC) (Appellant)*; *Secretary of State for the Home department (Appellant) v AF (FC) (Respondent)* [2007] UKHL 46, both of which were decided after *Anderson's case*.

of Mr. Anderson. By section 6(3)(b) of the 1998 Act the Secretary of State is a public authority subject to the provisions of section 6(1) of the same Act. Section 6(1) provides that “it is unlawful for a public authority to act in a way which is incompatible with a Convention right.” The real issue was therefore the lawfulness of the Home Secretary’s action in fixing the tariff.

However, section 6(2)(a) excused the Home Secretary’s action since it was authorised by primary legislation, that is, by section 29 of the Crime (Sentences) Act 1997. In the circumstances, using section 3(1) of the 1998 Act would have had the effect of making the Home Secretary’s action unlawful contrary to the clear provisions of section 6(2)(a) which protects him as well as the action itself.

It is submitted that the principles that made it possible to modify the relevant legislative provisions in *R v A* applies with equal force to this case. Since it is the Convention right of the mandatory life prisoner that is to be protected, it would have been possible, in principle, to construe section 29 of the Crime (Sentences) Act 1997 in a manner that required the Secretary of State to accept the judicial recommendation in all cases. This, no doubt, would seem to have departed from the intention of Parliament when it enacted the legislation. But then, the case law has shown that that could be done if it were necessary to achieve compatibility with the Convention rights.

In the light of all the above, *Anderson* is indicative of the fact that while it may be possible in principle to judicially modify primary legislation by use of section 3(1) interpretation, it may nevertheless be inappropriate to do so in the light of the *character* of the legal challenge.⁶⁵¹

In a considerable number of cases, the judges have constantly emphasised that the obligation in section 3(1) of the 1998 Act was one of *interpretation* and not *legislation*.⁶⁵² The judges stress this point almost to a level of emphasis that makes one wonder whether any usefulness is left of section 3(1). Because these judicial statements appear to suggest a general inclination to section 4 of the Act, the view taken by this writer, that the judges tend to be using section 3(1) in a manner that profoundly challenges the traditional concept of parliamentary sovereignty, seems at first glance to be misconceived. However, it is submitted that such statements could be misleading. While in principle, they may be correct to say that section 3(1) requires them to *interpret* and not *legislate*, the reality disclosed by the case law is that they have in appropriate cases felt able to judicially amend primary legislation found to be incompatible with the Convention rights.

What happened in cases such as *R v A, Attorney General's Reference (No. 4 of 2002)*, *Ghaidan v Mendoza*, *MB* and others in that line was nothing less than judicial amendment of the relevant offending provisions. It would be impossible to arrive at those decisions without the court exercising some legislative powers.

⁶⁵¹ A possible, extra-legal factor that might have influenced *Anderson's* case was that Scotland and Northern Ireland had taken legislative action to remedy a similar legislative breach of the Convention right to a fair trial and there was expectation that similar legislative action would be taken in respect of England and Wales.

⁶⁵² See *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2001] 3 W.L.R. 183, *In re S (Minors) (Care Order): Implementation of Care Plan*; *In re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10; [2002] 2 AC 291, *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467, [2003] 2 All ER 593, [2003] 1 FLR 1043, [2003] 2 FCR 1, *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [2004] 3 All ER 411, [2004] 2 FLR 600, *R v Lambert* [2001] 3 All ER 577, *R v A* [2001] UKHL 25, [2002] 1 AC 45, [2001] 3 All ER 1, [2001] 2 WLR 1546.

In the light of the totality of the case law on section 3(1) of the 1998 Act, these statements could be rationally explained if they were taken only as a warning that the interpretative power under section 3(1) is not without limits. “As far as possible” as it appears in section 3(1) no doubt suggests that in some cases it may not be possible to interpret legislation compatibly with the Convention rights. Accordingly, section 4 empowers the court to make a declaration of incompatibility in cases where it is not possible to remove the incompatibility by use of section 3(1).

The reality is that the judges perceive section 3(1) as permitting judicial legislation. What has not been made certain is the precise extent to which the courts could go in taking *judicial legislative action*. Since the limit is not precisely defined, the courts themselves have been developing principles that would guide and help them in ensuring that they do not go beyond what is permissible in the exercise of their power under section 3(1).

The statements should therefore not shroud the immense judicial power that section 3(1) of the 1998 Act seems to have given the courts. It has enabled them to protect Convention rights in a way that was impossible before the advent of the 1998 Act. By virtue of section 3(1), the courts now feel able to judicially change the meaning and effect of primary legislation irrespective of the fact that no ambiguity exists, or of the fact that the resultant meaning is inconsistent with the intention of Parliament in enacting the legislation under scrutiny.

III– Conclusion

As can be seen in the preceding chapter, the legislative background to the enactment of the 1998 Act disclosed a clear and strong desire to preserve the traditional concept of

parliamentary sovereignty.⁶⁵³ This desire found expression in section 3(2)(b) and (c) and section 4(6)(a) and (b) of the 1998 Act respectively. Apparently, the provisions therein were meant to preserve parliamentary sovereignty.

The study found that the senior judiciary was in general agreeable to the idea that parliamentary sovereignty should be preserved in the scheme of the 1998 Act.⁶⁵⁴

However, as mentioned in the introductory chapter of this thesis, various dicta in *Jackson*⁶⁵⁵ suggested that the courts no longer accorded unqualified respect to the doctrine of parliamentary sovereignty. Specifically, Lord Hope suggested that the interpretative obligation under section 3(1) of the 1998 Act had substantially qualified parliamentary sovereignty.⁶⁵⁶

In the light of these suggestions, it was indicated that this chapter would investigate the role that section 3(1) of the 1998 Act plays in the interpretation and application of primary legislation touching on the Convention rights.

It was also indicated that there would be a discussion of how the courts have utilised their interpretative power under section 3(1) and how and to what extent this has impacted on their attitude to the traditional concept of parliamentary sovereignty.

Central to the inquiry was the resolution of certain basic questions. First, when acting pursuant to the interpretative obligation under section 3(1) of the 1998 Act, do the courts feel

⁶⁵³ Home Department (1997). *Rights Brought Home: The Human Rights Bill*. Home Department, The Stationery Office. **Command Paper No. Cm 3782**

⁶⁵⁴ See chapter 5.

⁶⁵⁵ [2005] UKHL 56

⁶⁵⁶ See paragraph 105 of the judgment, *ibid*.

able to ignore the clear and unambiguous intention of parliament as reflected in an offending provision if this were necessary to protect Convention rights?

Secondly, do they feel inhibited by concerns about parliamentary sovereignty and therefore feel constrained to leave offensive primary legislation untouched in spite of a violation of the Convention rights?

Lastly, on the whole, has section 3(1) impacted on judicial attitudes to the traditional concept of parliamentary sovereignty?

The analysis of the relevant case law has revealed interesting evidence. While on the one hand, the judges have repeatedly stressed that their duty under section 3(1) of the 1998 Act remained one of interpretation and not legislation, the evidence disclosed by the case law suggests that in many cases their use of the interpretative obligation go much further than the conventional ways of statutory interpretation and amount in effect to nullifying legislative provisions held to be in breach of the Convention rights.

By the conventional methods of statutory interpretation, the focus is generally on ascertaining the intention of Parliament in enacting the legislation under consideration. Once that intention has been ascertained, it is generally expected that the court would obey and apply it in line with the rule of absolute judicial obedience to Acts of the sovereign Parliament as demanded by the traditional doctrine of parliamentary sovereignty.⁶⁵⁷

However, it would appear that in interpreting primary legislation pursuant to the interpretative obligation contained in section 3(1) of the 1998 Act, the judges accord a

⁶⁵⁷ See generally, chapters 2 and 3.

relatively insignificant role to the intention of Parliament in enacting the statute being construed, and a much greater role to the intention of Parliament expressed in section 3(1). The result is that in the absence of specific and unequivocal provisions to the contrary, the parliamentary intention expressed in section 3(1) could override that expressed in the legislation under consideration even if it was enacted after the 1998 Act.

As has been mentioned earlier, Parliament seemed to have intended a fair balance between on the one hand, the effective protection of the Convention rights in the domestic courts, and on the other hand, judicial respect for parliamentary sovereignty.⁶⁵⁸ Thus, Lord Irvine advocated a principled balance between judicial activism and judicial restraint in statutory interpretation under the 1998 Act.⁶⁵⁹ However, this has not been widely reflected in the case law. On the contrary, it seems that Lord Steyn's perception of the section 3(1) interpretation as the primary remedial mechanism provided by the Act for the effective protection of the Convention rights⁶⁶⁰ has gained wide appeal amongst the judges. This approach to section 3(1) requires a high degree of creativity in the interpretative process. The result is that increasingly, the judges appear to be taking it upon themselves to judicially rectify primary legislation determined to be incompatible with the Convention rights. This appears to be the case even in cases where the resultant interpretation under section 3(1) departs from the clear and unambiguous intention of Parliament in enacting the legislation under consideration.

The judges' creative use of section 3(1) in the interpretation and application of primary legislation seems to have ignored the essence of the combined provisions in sections 3(2),

⁶⁵⁸ See chapter 5.

⁶⁵⁹ Irvine (1999). "Activism and Restraint: Human Rights and the Interpretative Process." European Human Rights Law Review 4: 350-372.

⁶⁶⁰ See paragraph 50 of his judgment in *Ghaidan v Mendoza* [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 All ER 411.

4(6) and 10 of the 1998 Act as well as the procedures spelt out in Schedule 2 to the Act.⁶⁶¹

The provisions therein were apparently intended to make the protection of the Convention rights a joint effort by the executive, Parliament and the courts. They call for a dialogue between the judges on the one hand, and the executive and ultimately Parliament on the other hand. Thus, where the clear and unambiguous intention of Parliament in enacting legislation is determined by the courts to be in breach of the Convention rights, this should be made clear to the appropriate Minister of the Crown who may then take remedial action pursuant to section 10 and Schedule 2 of the Act. This procedure has the advantage of affording a high degree of protection for the Convention rights while simultaneously preserving the traditional concept of parliamentary sovereignty.

Ekins has criticised the current judicial approach to section 3(1) of the 1998 Act, which seems to indicate that the judges perceive the interpretative obligation therein as authorising them to disregard the clear and unambiguous intention of Parliament in enacting the statute under consideration for the purpose of ensuring compatibility with the Convention rights. For him, the interpretative obligation contained in section 3(1) should not be seen as enabling judges to ignore legislative intent. He argues that section 3(1) should be used only where there is a genuine confusion as to what Parliament intended when enacting the statute under consideration.⁶⁶²

While this writer may not completely agree with Ekins that section 3(1) may be used only to resolve ambiguities detected in the statute under consideration, it is submitted that the way the judges have generally approached the interpretative process undermines the restrictive provisions contained in section 3(2) of the 1998 Act. The sub-section protects the validity,

⁶⁶¹ See chapter 5.

⁶⁶² Ekins, R. (2003). "A Critique of Radical Approaches to Rights Consistent Statutory Interpretation." European Human Rights Law Review 6: 641-650.

continuing operation or enforcement of any incompatible primary legislation, or of any incompatible subordinate legislation authorised by primary legislation. However, where judges ignore parliamentary intention and alter the meaning and effect of primary legislation by use of section 3(1), the practical effect is that thenceforth the statute concerned would operate as if amended by the court.⁶⁶³ Thus, Gearty⁶⁶⁴ argues that an interpretation under section 3(1) must take account of section 3(2).⁶⁶⁵ He is of the view that if the resultant interpretation renders the guarantee in section 3(2) useless, then it is not an interpretation authorised by section 3(1).⁶⁶⁶

In contrast to the case law discussed in chapter 2 and 3 above, in interpreting primary legislation pursuant to section 3(1) of the 1998 Act, in general, the judges appear to be far less concerned about the possibility that their decisions might be offensive to the traditional concept of parliamentary sovereignty, and more concerned with finding a Convention-compatible interpretation. Indeed, even before the 1998 Act came into operation, Lord Hope⁶⁶⁷ had stated that “the judges need be under no inhibition, on the grounds of parliamentary sovereignty, about departing from what might be thought to have been the intention of Parliament in their search for a possible meaning of the words used.”

The evidence from the case law suggests that in many cases, judges are prepared to accord priority to the intention of Parliament expressed in section 3(1) of the 1998 Act over the clear

⁶⁶³ For example, this seems to be the case with paragraph 2(2) of Schedule 1 to the Rent Act 1977 after the decision in *Ghaidan v Mendoza* [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 All ER 411.

⁶⁶⁴ Gearty, C. A. (2002). "Reconciling Parliamentary Democracy and Human Rights." Law Quarterly Review **118**(April): 248-269.

⁶⁶⁵ See chapter 5.

⁶⁶⁶ See chapter 5..

⁶⁶⁷ Hope (1999). "The Human Rights Act 1998: The Task of the Judges." Statute Law Review **20**(September): 185.

and unambiguous intention of Parliament expressed in a later enactment.⁶⁶⁸ It is submitted that this goes against the traditional concept of parliamentary sovereignty, which demands that the court obey and apply the latest will of Parliament in preference to an inconsistent provision contained in an earlier enactment.

It is observed that in many of the cases where the courts have declined to use section 3(1) to modify primary legislation, factors other than any real concern for a possible breach of the doctrine of Parliamentary sovereignty appear to account for them. As has been discussed earlier, these factors include a lack of institutional competence on the part of the court to deal with the issue at hand, as well as the character of the legal challenge involved in the case.

The more Parliament concedes (even if passively) to judicial modifications of statutes determined to constitute a violation of the Convention rights, the more likely that judges would in future gradually elevate the Convention rights to a status little different from what obtains in an entrenched Bill of Rights.

CHAPTER 7

CONCLUSION

“... neither the Act of Union with Scotland nor the Dentist Act, 1878, has more claim than the other to be considered a supreme law. Each embodies the will of the sovereign legislative power; each can be legally altered or repealed by Parliament; neither tests the validity of the other. Should the Dentists Act, 1878, unfortunately contravene the terms of the Act of Union, the Act of Union would be *pro tanto* repealed, but no judge would dream of maintaining that the Dentist Act, 1878, was thereby rendered invalid or unconstitutional. The one

⁶⁶⁸ See for example *Secretary of State for the Home Department (Respondent) v MB (FC) (Appellant)*; *Secretary of State for the Home Department (Respondent) v AF (FC) (Appellant)*; *Secretary of State for the Home Department (Appellant) v AF (FC) (Respondent)* [2007] UKHL 46.

fundamental dogma of English (*sic*) constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament.”⁶⁶⁹

I. OVERVIEW OF THE STUDY

At the beginning of this thesis,⁶⁷⁰ it was indicated that the principal aim in the thesis would be to examine, through an analysis of relevant case law, how the courts have approached the interpretative obligation contained in section 2(1) and (4) of the 1972 Act and section 3(1) of the 1998 Act in the interpretation and application of primary legislation. The objective has been to assess the case law and determine whether the interpretative approaches adopted under the above-mentioned provisions differ from conventional methods of statutory interpretation, and whether, and to what extent these provisions have impacted on judicial attitudes to the traditional, *Diceyan* concept of parliamentary sovereignty.

It is observed that the traditional concept of parliamentary sovereignty demanded absolute judicial obedience to the latest will of Parliament.⁶⁷¹ By this concept, Parliament could enact whatever laws it deemed fit and the constitutional duty of the courts was simply to obey and apply the will of Parliament as manifested in a statute. No legal grounds could exist for challenging the validity or operation of an Act of Parliament.

Three essential elements of the traditional concept of parliamentary sovereignty were identified in chapter 1 of the thesis. The first was that no court could disobey or render ineffective the provisions of an Act of Parliament on any grounds whatsoever. Once an Act has been passed in the traditional way, that is, by both Houses of Parliament, and has

⁶⁶⁹ Dicey, *op. cit.*, *supra*, note 1, at p. 145

⁶⁷⁰ See chapter 1

⁶⁷¹ See chapter 2

received the royal assent, the fact that irregularities were committed in the legislative process by which the Act came into being could not enable a court to disobey or refuse to apply the Act in accordance with the will of Parliament.

Secondly, by the traditional concept of parliamentary sovereignty, an Act of Parliament is the highest form of law in the United Kingdom. Thus, no other form of law could override it. An Act of Parliament could not be applied subject to the terms of any other form of law, whether common law, previous statute law, fundamental rights, international treaty provisions or principles of international law.

Lastly, by the traditional concept, no Parliament could prevent its successor Parliament from legislating in breach of restrictions imposed in an existing Act of Parliament. Thus, Parliament could always alter existing legislation in any manner it deemed fit, and this could be done either expressly or by necessary implication. Therefore, the principle of implied repeal could be seen as concomitant to the traditional concept of parliamentary sovereignty.

As noted in chapter 1, some writers have argued that one Parliament could legally bind its successor Parliaments as to the manner and form of legislating.⁶⁷² Also, in *Jackson v Her Majesty's Attorney General*⁶⁷³ Lord Hope appeared to doubt if parliamentary sovereignty was ever absolute.

However, the case law discussed in chapter 2 seems to have demonstrated that as a legal principle, the courts have on the whole perceived parliamentary sovereignty as absolute, requiring them to give unqualified judicial obedience to the latest will of Parliament.

⁶⁷² See for e.g. Jennings (1959). *The Law and the Constitution*.
See also Heuston, R. F. V. (1964). *Essays in Constitutional Law*. London, Stevens & Sons.

⁶⁷³ [2005] UKHL 56, at paragraph 104 of the judgment

While Parliament possesses the power to make primary legislation, all statutes enacted by it fall to be interpreted by the courts. However, it has been observed that the main judicial objective, when interpreting legislation, is to ascertain the intention of Parliament in enacting the legislation, and to apply that intention.⁶⁷⁴ In fact, Bennion has stated this to be the “sole object in statutory interpretation.”⁶⁷⁵ This, it is submitted, is in line with the traditional concept of parliamentary sovereignty.

It was indicated that the principal method of ascertaining the intention of Parliament expressed in a statute was to give the words used in the statute their natural and ordinary meaning as that was the best indication of Parliament’s intention.⁶⁷⁶ However, there may be instances where the words used may be ambiguous in the sense that they are capable of bearing more than one meaning. In such cases, courts have been able to call in aid, relevant rules of construction of statutes and presumptions of law, in order to arrive at the most appropriate legislative intention. For example, there is a presumption that Parliament does not intend to legislate in breach of its international obligations. Therefore, whenever a statutory provision is capable of both a meaning that breaches United Kingdom’s international obligations and one that fulfils those obligations, the latter interpretation is to be preferred. However, as has been observed, the relevant rules of construction and presumptions of law come into play only when there is genuine ambiguity as to the intention of Parliament expressed in the statute. If the words used adequately and unambiguously convey the intention of Parliament, it would be an illegitimate exercise of judicial power to seek alternative interpretations.

⁶⁷⁴ See chapter 3.

⁶⁷⁵ Bennion, F. (2008). Bennion on Statutory Interpretation. London, LexisNexis, at p. 469.

⁶⁷⁶ See chapter 3.

It has been shown in chapter 3 that in certain circumstances, courts have exercised a power under the common law, to modify what appears to be the plain and unambiguous language of a statutory provision. However, the case law shows that this power is limited to instances where the plain words lead to an absurd result. Thus, in the absence of absurdity, the courts would be bound to give the plain language its natural and ordinary meaning.

As a whole, chapter 3 seems to have demonstrated that the need to identify and carry out the latest intention of Parliament as expressed in primary legislation has been the guiding principle in the interpretation and application of primary legislation.

With respect to the interpretative obligation under section 2(4) of the 1972 Act, two judicial approaches to the interpretation and application of primary legislation touching on directly applicable Community law has been identified.⁶⁷⁷ First, it is observed that by virtue of the interpretative obligation contained in section 2(4) of the 1972 Act, the judges now apply the “without prejudice” rule of construction, thus ensuring that the terms of the 1972 Act prevail over clear and unambiguous provisions in later Acts of Parliament.

Secondly, the purposive approach adopted by the courts in the interpretation of legislation enacted for the purpose of fulfilling United Kingdom obligations under Community law seems to have enabled judges to modify clear and unambiguous statutory provisions even where such clear and unambiguous provisions lead to no absurdity.

The judicial approach to the interpretative obligation contained in section 2(4) of the 1972 Act seems to be without any precedents prior to the coming into effect of the Act. As a matter

⁶⁷⁷ See chapter 4.

of fact, it could be argued that the approach went against existing precedent as indicated in *Ellen Street Estates Ltd v Minister of Health*.⁶⁷⁸

Two theoretical explanations for the judicial approach to the interpretation of statutes under section 2(4) of the 1972 Act were identified in chapter 4 above. The first was Lord Bridge's doctrine of *voluntariness*,⁶⁷⁹ which, in one way, could be interpreted as indicating that the judicial treatment of section 2(4) of the 1972 Act has been based on Parliament's voluntary acceptance of the terms of membership of the Community, part of which was the acceptance of the European principles of direct applicability and supremacy of Community law.

The second theoretical explanation identified in chapter 4 was Lord Justice Laws' common law theory, which seemed to explain the judicial treatment of the interpretative obligation under section 2(4) of the 1972 Act by asserting an existing judicial power under the common law to modify the concept of parliamentary sovereignty in light of contemporary constitutional developments. As he stated: "the scope and nature of parliamentary sovereignty are ultimately confided" in the courts.⁶⁸⁰

While there are marked differences between Lord Bridge's explanation for the judicial treatment of section 2(4) of the 1972 Act and that of Lord Justice Laws, they are both remarkable for indicating that the seemingly unchangeable concept of parliamentary sovereignty, as shown by the case law discussed in chapter 2 above, is now seen as

⁶⁷⁸ [1934] All ER 385, [1934] 1 KB 590

⁶⁷⁹ See judgment of Lord Bridge in *Factortame v Secretary of State for Transport (No2)* [1991] 1 All ER 70, [1990] 3 WLR 818

⁶⁸⁰ See paragraph 60 of Lord Justice Laws' judgment in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151

susceptible to change in accordance with contemporary constitutional developments. The question whether this is good or bad for the constitutional well-being of the country is outside the scope of this thesis. What is important is that there seems to be evidence in the case law that judicial attitudes to the traditional concept of parliamentary sovereignty outlined in chapter 2 above have been significantly impacted by the interpretative obligation in section 2(4) of the 1972 Act.

Chapter 6 has demonstrated that in interpreting primary legislation pursuant to the interpretative obligation under section 3(1) of the 1998 Act, the dominant judicial approach seems to be to accord less role to the parliamentary intention expressed in the statute under consideration, and more role to the judicial duty to ensure a Convention-compatible interpretation. Thus, section 3(1) appears to have been regarded as the primary means by which the courts ensure that the United Kingdom fulfils its obligations under the Convention. The principled balance between rights-oriented interpretation on the one hand, and respect for parliamentary sovereignty on the other hand, a notion which seems to be at the heart of the 1998 Act, and which was indeed advocated by Lord Irvine,⁶⁸¹ seems not to have been reflected in the case law. The result is that the judges have felt able to modify the meaning and effect of clear and unambiguous legislative provisions found to offend the Convention rights in order to make them Convention-compatible.

Chapter 6 has also demonstrated that in many cases where the courts have declined to use section 3(1) of the 1998 Act to remedy legislative breaches of the Convention rights, the real reason for the decision not to use section 3(1) might have more to do with a lack of institutional competence on the part of the judiciary to deal effectively with the matter at

⁶⁸¹ Irvine (1999). "Activism and Restraint: Human Rights and the Interpretative Process." European Human Rights Law Review 4: 350-372.

hand, or even the character of the legal challenge in the case, and less to do with a judicial desire to respect parliamentary sovereignty.

II. CONCLUDING REMARKS

The case law has demonstrated that the interpretative approaches adopted by the judges pursuant to the interpretative obligations contained in section 2(4) of the 1972 Act and section 3(1) of the 1998 Act are different from conventional approaches to statutory interpretation. As has been noted in chapter 3 above, conventionally, the emphasis seemed to have been on the need to ascertain the intention of Parliament in enacting the legislation under consideration, and on applying that intention. However, the interpretative approaches adopted by the judges, both under section 2(4) of the 1972 Act and section 3(1) of the 1998 Act, seems to indicate that the parliamentary intention expressed in the legislation under consideration plays a less significant role in that the judicial focus under these provisions is to ensure compliance with the demands of directly effective Community law and the Convention rights respectively. Thus, the judges have felt able to alter clear and unambiguous statutory provisions for the purpose of making them compatible with directly effective Community law, or the Convention rights. In other words, the intention of Parliament expressed in section 2(4) of the 1972 Act and section 3(1) of the 1998 Act have been held in appropriate cases to override the clear intention of Parliament expressed in subsequent enactments.

As appears clear from the foregoing, the idea that the courts have a duty to obey the last will of Parliament seems to have been seriously challenged by the courts' use of their

interpretative powers under the 1972 and 1998 Acts; this is particularly so in the courts' acceptance that directly effective Community law prevails over any inconsistent domestic legislation, (whether primary or subsidiary) whenever enacted. This raises questions about the very nature of the concept of parliamentary sovereignty and the concomitant question of who has the final authority to determine the legislative capacity of Parliament to legislate for the country.

It may be recalled that in the second *Factortame* case, the only attempt to explain this seemingly ground-breaking decision to give priority to directly effective Community law over primary legislation duly enacted by Parliament was contained in Lord Bridge's statement.⁶⁸² There, his Lordship seemed to have indicated that the basis of the judicial enforcement of the principle of the supremacy of directly effective Community law over domestic primary legislation was the voluntary acceptance of the principle by Parliament itself, which was embodied in the 1972 Act. It would seem that the implication of this is that one Parliament may bind its successor Parliament by enacting legislation in a manner that requires the courts to ignore future legislation found to be inconsistent with it. In this way, unless the power granted the judiciary is withdrawn by a deliberate and specific provision in a future Act of Parliament expressed in unequivocal terms, the judiciary would presume, and act on the presumption that the successor Parliament approves of the judicial power to ignore or "disapply" the legislation under consideration for being inconsistent with the earlier legislation.

The above view, even though inconsistent with the main idea of the traditionalists, that Parliament's sovereignty is "continuing" and its clear intention embodied in an Act could

⁶⁸² [1991] 1 All ER 70; [1990] 3 WLR 818, *op cit*, *supra*, note 296.

therefore not be disobeyed under the guise of interpretation, is quite mild (as far as the traditional concept of parliamentary sovereignty is concerned) when compared to other notions about the nature of parliamentary sovereignty. At least, Lord Bridge appears to accept the main idea that Parliament's legislative capacity is to be determined by no other authority but Parliament itself. Thus, judicial enforcement of the principle of the supremacy of directly effective Community law over primary legislation could not have been done on the basis of an inherent judicial power; it could be done only on the presumption that the continuing existence of section 2(1) and (4) of the 1972 Act in the statute book is a reflection of the present Parliament's approval, albeit constructive, that all legislation must be construed in accordance with the relevant provisions of the 1972 Act. It would appear that the main challenge which Lord Bridge's idea poses to the traditional concept of parliamentary sovereignty is the judicial assertion that the interpretative power derived under the 1972 Act cannot be withdrawn impliedly.

But for Lord Justice Laws, "the scope and nature of parliamentary sovereignty are ultimately confided" in the courts, not Parliament.⁶⁸³ This is because parliamentary sovereignty is not a creation of statute; it is a product of the common law. And as a common law principle, the scope and nature of Parliament's legislative authority falls to be determined by the courts in the context of prevailing fundamental constitutional norms. As seen in *Thoburn's* case, Lord Justice Laws has put forward the notion that the common law has now recognised certain statutes as "constitutional statutes", distinct from "ordinary statutes".⁶⁸⁴ While the principle of implied repeal applies to ordinary statutes, it does not apply to constitutional statutes. Thus, where a constitutional statute is concerned, the courts would obey a future Act of Parliament found to be inconsistent with the constitutional statute only if there is a deliberate

⁶⁸³ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151. See paragraph 60 of the judgment.

⁶⁸⁴ See chapter 4.

and specific repeal of the constitutional statute. Again, this challenges the traditional view that all statutes have equal status and could be repealed expressly or by implication. It introduces the concept of a “hierarchy of laws” as part of the British legal system, an idea that does not sit comfortably with the traditional concept of parliamentary sovereignty.

It is observed that on analysis, at least at the present moment, neither Lord Bridge nor Lord Justice Laws claims any judicial power enabling judges to impose substantive legal constraints on the legislative capacity of Parliament to enact laws for the country. The constraints on Parliament’s legislative power to legislate are seemingly formal in character, and can be overcome by the form of expression used in a statutory provision.

However, both Lord Bridge and Lord Justice Laws seem to suggest that it may be inappropriate to regard the principle of implied repeal as a fixed element of the doctrine of parliamentary sovereignty. The application of the principle of implied repeal would depend on the nature of the legislation concerned. While the courts would always obey Parliament’s will, it would nevertheless insist that that will be made much clearer and in unmistakable terms when it is inconsistent with what the court determines to be a constitutional statute.

Be that as it may, there are indications that Lord Justice Laws is of the view that limits on Parliament’s legislative authority may move from the seemingly formal limitations presently imposed by the courts through interpretative methods adopted under the 1972 and 1998 Acts, to substantive limitations whereby Parliament may not be allowed to legislate in breach of fundamental constitutional norms such as judicial review and basic electoral rights necessary for the sustenance of democracy itself. In fact, according to him, such a move has already

begun: “in its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy....”⁶⁸⁵

The idea that there could be substantive limits to the legislative capacity of Parliament has been strongly put forward by T.R.S. Allan.⁶⁸⁶ An important element of the traditional conception of the doctrine of parliamentary sovereignty as put forward by Dicey is the strict separation of law and morality. While morality may have a role to play in the interpretation of statutory provisions, judges are nevertheless duty-bound to apply the clear and unambiguous will of Parliament irrespective of the judges’ notion of morality. According to Dicey,

“There is no legal basis for the theory that judges, as exponents of morality, may overrule Acts of Parliament. Language which might seem to imply this amounts in reality to nothing more than the assertion that the judges, when attempting to ascertain what is the meaning to be affixed to an Act of Parliament, will assume that Parliament did not intend to violate the ordinary rules of morality, or the principles of international law, and will therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines both of private and of international morality.”⁶⁸⁷

Allan asserts that this strict division between law and morality is wrong.⁶⁸⁸ According to Allan, legal principle cannot be divorced from political morality. The source of judicial obedience to Acts of Parliament, which is the foundation of the doctrine of parliamentary sovereignty, cannot be found in statute. The courts’ acceptance of parliamentary sovereignty is but a reflection only of the courts’ commitment to parliamentary democracy. Acts of

⁶⁸⁵ *International Transport Roth GmbH and others v Secretary of State for the Home Department* [2002] EWCA Civ 158, at paragraph 70 of the judgment.

⁶⁸⁶ Allan, T. R. S. (1985). "The Limits of Parliamentary Sovereignty." *Public Law Winter*: 614-634.

. See also Allan, T. R. S. (1993). *Law, Liberty, and Justice*. Oxford, Oxford University Press: Chapter 11. However, Allan is not the only one who has suggested substantive limits to Parliament’s legislative authority. See Chapter 1 above, for example, Lord Woolf, *op cit*, *supra*, notes 6- 8; Sir Stephen Sedley, *op cit*, *supra*, note 13.

⁶⁸⁷ *op cit*, *supra*, note 1, at pp. 62-63.

⁶⁸⁸ See Allan (1985) *op cit*, *supra*, note 686. See generally pp. 615-629

Parliament have legal authority only because they have democratic legitimacy. It follows that the rule that judges obey Acts of Parliament is necessarily subject to the condition that minimum standards of democratic principles are left untouched. If they are undermined in a fundamental way by an Act of Parliament, then there can be a basis for the courts to refuse to apply the Act.

Allan agrees that judicial perceptions of general notions of justice and fairness cannot override parliamentary enactments. However, he sought to distinguish these from what he called “the central core” of the country’s political morality – those irreducible minimum standards without which democracy itself would be seriously threatened. He argues that “if Parliament ceased to be a representative assembly, in any plausible sense of the idea, or if it proceeded to enact legislation undermining the democratic basis of our institutions, political morality might direct judicial resistance rather than obedience.”⁶⁸⁹

To Allan, parliamentary sovereignty is nothing but a convention, albeit the most fundamental constitutional convention of the United Kingdom. As a constitutional convention, it is constituted, or justified by the political morality which underlies the legal order within which all institutions of State operate. The core political morality is representative democracy, as that is the basis of all the institutions of State, including Parliament and the courts. Therefore, parliamentary authority depends on the existence of representative democracy. It follows that parliamentary enactments would lose their legal validity if parliamentary democracy, the basis of Parliament’s authority to legislate for the country, is undermined in a fundamental way.

⁶⁸⁹ Ibid, at p.621

The issue of minimum standards of political morality, which is central to Allan's theory, raises a number of questions. In the absence of a written constitution where the scope of authority of the main institutions of State are clearly defined, who should determine minimum standards of democracy? Should it be the electorate? If yes, how would those standards be spelt out with precision? It would be practically impossible for the electorate as a body to determine in any useful manner what the minimum standards of democracy should be. It presumes a consensual image of society, which is practically unrealistic. Should it be Parliament itself, being the representatives of the people? It could be argued that as a matter of principle, it would be inappropriate for Parliament to determine the minimum standards of democracy when the question is whether its own enactment has failed to satisfy those minimum standards. Should it be the courts who should determine both the minimum standards as well as the question whether those standards have been met by Parliament in any given case? The main argument against the courts would be that they have no democratic credentials to determine the minimum standards of democracy, being unelected. However, it could be argued in favour of the courts that certain norms are basic and universal, and could be objectively defined in reasonably precise terms. For example, periodic elections are a core element of representative democracy; therefore, it is clear that any Act of Parliament which totally abolishes regular elections would have failed to reach the minimum standards of representative democracy.

It is observed that the limits to parliamentary sovereignty suggested by Allan are almost unrealistic. It is virtually unthinkable that Parliament would abolish representative democracy. Were it to do that, a revolution would have occurred and it would be inappropriate to speak of the body as Parliament in the usual sense. The question would then

be whether the courts would invoke the doctrine of necessity and transfer judicial allegiance to the new legislative body. That would be a different matter altogether.

The suggested minimum standards of democracy have been set so high that it is highly unlikely that any parliamentary enactment would fall below them. For example, Allan wrote of “a parliamentary enactment whose effect would be the destruction of any recognizable form of democracy (for example, a measure purporting to deprive a substantial section of the population of the vote on the grounds of their hostility to Government policies).”⁶⁹⁰ As Simon Lee commented, “... it would take something as ludicrous as Parliament attempting to take us back to an all-male franchise before Trevor Allan’s ‘judicial resistance’ would come into play.”⁶⁹¹ If it is accepted that in the real world, Parliament would not do the unthinkable, then Dicey’s concept of parliamentary sovereignty, as a legal principle, would mean that the last word on legally enforceable norms remain with Parliament, and not the courts, or the electorate.

Furthermore, Allan’s theory have the capacity to lead to serious conflicts between Parliament and the courts, something which both institutions have strived to avoid since *Stockdale v Hansard*,⁶⁹² and the *Sheriff of Middlesex’s Case*⁶⁹³ which arose from the former. Although those cases arose in the context of parliamentary privilege, there is no reason to think that such a clash would not be likely if the courts were to directly challenge Parliament’s legislative capacity on substantive grounds as suggested by Allan. As Simon Lee quite rightly observed,⁶⁹⁴ judicial invalidation might well attract parliamentary reaction. The present state, where the courts feel able to use their interpretative powers as extensively as possible to

⁶⁹⁰ Ibid, at pp. 620-621

⁶⁹¹ Op cit, note ... See comment by Simon Lee at p. 632

⁶⁹² (1839) 9 Ad & E 1; (1839) 3 St Tr (NS) 723

⁶⁹³ (1840) 11 Ad & E 273

⁶⁹⁴ Op cit, note ..., at p. 633-634.

ensure that primary legislation is interpreted and applied subject to the terms of the 1972 and 1998 Acts while acknowledging their duty to obey the ultimate power of Parliament to enact contrary legislation if this is done in deliberate and specifically expressed form, seems a better option which serves to keep the polity unheated.

It has to be noted that Dicey himself accepted the sort of limits suggested by Allan as real, albeit political and moral, constraints on the authority of Parliament to legislate. However, those constraints are not relevant to the legal validity of parliamentary enactments.

What has the case law covered in this study revealed? There is no evidence from the case law, both as it relates to the 1972 Act and the 1998 Act, that the judges are as yet ready to place substantive restrictions on Parliament's legislative capacity. In theory, the courts continue to recognise parliamentary sovereignty as absolute. Thus, they accept that Parliament could legislate in breach of the terms of section 2(1) and (4) of the 1972 Act and section 3(1) of the 1998 Act.

However, it is submitted that this theoretical acceptance of Parliament's supreme legislative power tends to becloud what the case law appears to have indicated, which is that, in practice, the traditional concept of parliamentary sovereignty, the rule of unquestioned judicial obedience to the clear and unambiguous intention of Parliament expressed in its latest enactment,⁶⁹⁵ has been modified to a significant extent.

⁶⁹⁵ As outlined in chapters 1 and 2 above.

The judicial assertion that the 1972 Act and the 1998 Act are “constitutional statutes”⁶⁹⁶ immune to the application of the principle of implied repeal suggests that a hierarchy of laws now exists in British constitutional law. Certain laws are *ordinary* and susceptible to implied repeal; others are *constitutional* and not subject to implied repeal.

Furthermore, so far, Parliament seems not to have nullified any of the judicial amendments made to statutory provisions pursuant to section 2(4) of the 1972 Act and section 3(1) of the 1998 Act. The reason is not far-fetched. As far as the United Kingdom remains a member of the Community, and a signatory of the Convention, it would make no political or diplomatic sense for Parliament to expressly and categorically legislate to nullify decisions of the courts which have rectified legislative breaches of Community law or the Convention rights as the case may be. In practice therefore, as the judges make more use of rights-consistent interpretation under section 3(1) of the 1998 Act, and Community law-compatible interpretations under section 2(1) and (4) of the 1972 Act, it is likely that the body of case law would in time grow and strengthen into something akin to a constitutional code against which inconsistent parliamentary enactments might not stand. Seen in this light, there might well be some weight in Lord Justice Laws’ statement that “in its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy....”⁶⁹⁷

TABLE OF CASES

⁶⁹⁶ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151. See paragraph 62-63 of Lord Justice Laws’ judgment.

⁶⁹⁷ See paragraph 70 of his judgment in *International Transport Roth GmbH and others v Secretary of State for the Home Department* [2002] EWCA Civ 158.

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Aero ZippFasteners v Y.K.K. Fastener (UK) Ltd [1973] CMLR 819

Assam Railways and Trading Co. Ltd. v. Commissioners of Inland Revenue [1935] A.C. 445, 457-458

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223.

Autologic Holdings Plc v. Inland Revenue Commissioners [2005] UKHL 54; [2006] 1 AC 118

Barclays Bank Plc v O'Brien [1993] 4 All ER 417

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Benjamin v United Kingdom 2000) 13 BHRC 287

Beswick v Beswick [1968] AC 58

Blackburn v Attorney General [1971] 1 WLR 1037

Brasserie du Pjcheur SA v Germany, R v Secretary of State for Transport, ex parte

British Coal Corporation v The King [1935] A.C. 500

British Railways Board v Pickin [1974] WLR 208

Brock v Wollams [1949] 1 All ER 715

Bulmer v Bollinger [1974] 2 All ER 1226

Case of Impositions (Bates Case) (1606) 2 St Tr 371

Case of Proclamations (1611) 12 Co Rep 74

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[1961] 2 WLR 401

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APPENDIX 1
SELECTED PROVISIONS OF THE EUROPEAN COMMUNITIES ACT 1972
(PART I – GENERAL PROVISIONS)

1.— Short title and interpretation.

(1) This Act may be cited as the European Communities Act 1972.

(2) In this Act [...] ¹—

“the Communities” means the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community;

“the Treaties” or “the Community Treaties” means, subject to subsection (3) below, the pre-accession treaties, that is to say, those described in Part I of Schedule 1 to this Act, taken with—

(a) the treaty relating to the accession of the United Kingdom to the European Economic Community and to the European Atomic Energy Community, signed at Brussels on the 22nd January 1972; and

(b) the decision, of the same date, of the Council of the European Communities relating to the accession of the United Kingdom to the European Coal and Steel Community; [and] ²

[(c) the treaty relating to the accession of the Hellenic Republic to the European Economic Community and to the European Atomic Energy Community, signed at Athens on 28th May 1979; and

(d) the decision, of 24th May 1979, of the Council relating to the accession of the Hellenic Republic to the European Coal and Steel Community; [and] ³ ⁴

[(e) the decisions of the Council of 7th May 1985, 24th June 1988, 31st October 1994, 29th September 2000 and 7th June 2007 on the Communities' system of own resources;] ⁵

[(g) the treaty relating to the accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community, signed at Lisbon and Madrid on 12th June 1985; and

(h) the decision, of 11th June 1985, of the Council relating to the accession of the Kingdom of Spain and the Portuguese Republic to the European Coal and Steel Community; [and] ⁶ ⁷

[(j) the following provisions of the Single European Act signed at Luxembourg and The Hague on 17th and 28th February 1986, namely Title II (amendment of the treaties establishing the Communities) and, so far as they relate to any of the Communities or any Community institution, the preamble and Titles I (common provisions) and IV (general and final provisions); [and] ⁸] ⁹

[(k) Titles II, III and IV of the Treaty on European Union signed at Maastricht on 7th February 1992, together with the other provisions of the Treaty so far as they relate to those Titles, and the Protocols adopted at Maastricht on that date and annexed to the Treaty establishing the European Community with the exception of the Protocol on Social Policy on page 117 of Cm 1934;[and]¹⁰]⁸

[(l) the decision, of 1st February 1993, of the Council amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20th September 1976;[and]¹¹]¹⁰

[(m) the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 together with the Protocol adjusting that Agreement signed at Brussels on 17th March 1993;[and]¹²]¹¹

[(n) the treaty concerning the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union, signed at Corfu on 24th June 1994;[and]¹³]¹²

[(o) the following provisions of the Treaty signed at Amsterdam on 2nd October 1997 amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts—

(i) Articles 2 to 9,

(ii) Article 12, and

(iii) the other provisions of the Treaty so far as they relate to those Articles, and the Protocols adopted on that occasion other than the Protocol on Article J.7 of the Treaty on European Union;[and]¹⁴]¹³

[(p) the following provisions of the Treaty signed at Nice on 26th February 2001 amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts—

(i) Articles 2 to 10, and

(ii) the other provisions of the Treaty so far as they relate to those Articles, and the Protocol adopted on that occasion; [...]]¹⁵]¹⁴

[(q) the treaty concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, signed at Athens on 16th April 2003;[and]¹⁵]¹⁶

[(r) the treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union, signed at Luxembourg on 25th April 2005;]¹⁵

[(s) the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community signed at Lisbon on 13th December 2007 (together with its Annex and protocol), excluding any provision that relates to, or in so far as it relates to or could be applied in relation to, the Common Foreign and Security Policy;]¹⁷ and any

other treaty entered into by any of the Communities, with or without any of the member States, or entered into, as a treaty ancillary to any of the Treaties, by the United Kingdom; and any expression defined in Schedule 1 to this Act has the meaning there given to it.

(3) If Her Majesty by Order in Council declares that a treaty specified in the Order is to be regarded as one of the Community Treaties as herein defined, the Order shall be conclusive that it is to be so regarded; but a treaty entered into by the United Kingdom after the 22nd January 1972, other than a pre-accession treaty to which the United Kingdom accedes on terms settled on or before that date, shall not be so regarded unless it is so specified, nor be so specified unless a draft of the Order in Council has been approved by resolution of each House of Parliament.

(4) For purposes of subsections (2) and (3) above, “treaty” includes any international agreement, and any protocol or annex to a treaty or international agreement.

2.— General implementation of Treaties.

(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression “enforceable Community right” and similar expressions shall be read as referring to one to which this subsection applies.

(2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may [by order, rules, regulations or scheme]¹⁸, make provision—

(a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above; and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligation or rights as aforesaid.

In this subsection “designated Minister or department” means such Minister of the Crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council.

(3) There shall be charged on and issued out of the Consolidated Fund or, if so determined by the Treasury, the National Loans Fund the amounts required to meet any Community obligation to make payments to any of the Communities or member States, or any Community obligation in respect of contributions to the capital or reserves of the European Investment Bank or in respect of loans to the Bank, or to redeem any notes or obligations

issued or created in respect of any such Community obligation; and, except as otherwise provided by or under any enactment,—

(a) any other expenses incurred under or by virtue of the Treaties or this Act by any Minister of the Crown or government department may be paid out of moneys provided by Parliament; and

(b) any sums received under or by virtue of the Treaties or this Act by any Minister of the Crown or government department, save for such sums as may be required for disbursements permitted by any other enactment, shall be paid into the Consolidated Fund or, if so determined by the Treasury, the National Loans Fund.

(4) The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council [or orders, rules, regulations or schemes]¹⁹.

(5) [...] ²⁰ and the references in that subsection to a Minister of the Crown or government department and to a statutory power or duty shall include a Minister or department of the Government of Northern Ireland and a power or duty arising under or by virtue of an Act of the Parliament of Northern Ireland.

(6) A law passed by the legislature of any of the Channel Islands or of the Isle of Man, or a colonial Law (within the meaning of the Colonial Laws Validity Act 1865) passed or made for Gibraltar, if expressed to be passed or made in the implementation of the Treaties and of the obligations of the United Kingdom thereunder, shall not be void or inoperative by reason of any inconsistency with or repugnancy to an Act of Parliament, passed or to be passed, that extends to the Island or Gibraltar or any provision having the force and effect of an Act there (but not including this section), nor by reason of its having some operation outside the Island or Gibraltar; and any such Act or provision that extends to the Island or Gibraltar shall be construed and have effect subject to the provisions of any such law.

3.— Decisions on, and proof of, Treaties and Community instruments etc.

(1) For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant [decision of the European Court or any court attached thereto])²¹.

(2) Judicial notice shall be taken of the Treaties, of the Official Journal of the Communities and of any decision of, or expression of opinion by, the European Court [or any court attached thereto]²² on any such question as aforesaid; and the Official Journal shall be admissible as evidence of any instrument or other act thereby communicated of any of the Communities or of any Community institution.

(3) Evidence of any instrument issued by a Community institution, including any judgment or order of the European Court [or any court attached thereto] ²² , or of any document in the custody of a Community institution, or any entry in or extract from such a document, may be given in any legal proceedings by production of a copy certified as a true copy by an official of that institution; and any document purporting to be such a copy shall be received in evidence without proof of the official position or handwriting of the person signing the certificate.

(4) Evidence of any Community instrument may also be given in any legal proceedings—

(a) by production of a copy purporting to be printed by the Queen's Printer;

(b) where the instrument is in the custody of a government department (including a department of the Government of Northern Ireland), by production of a copy certified on behalf of the department to be a true copy by an officer of the department generally or specially authorised so to do; and any document purporting to be such a copy as is mentioned in paragraph (b) above of an instrument in the custody of a department shall be received in evidence without proof of the official position or handwriting of the person signing the certificate, or of his authority to do so, or of the document being in the custody of the department.

(5) In any legal proceedings in Scotland evidence of any matter given in a manner authorised by this section shall be sufficient evidence of it.

NOTES

¹ Words repealed by Interpretation Act 1978 (c. 30), s. 25, Sch. 3

² Word inserted by European Communities (Greek Accession) Act 1979 (c. 57), s. 1

³ Substituted by European Communities (Finance) Act 2001 c. 22 s.1 (December 4, 2001)

⁴ S. 1(2)(c)(d) inserted by European Communities (Greek Accession) Act 1979 (c. 57), s. 1

⁵ Substituted by European Communities (Finance) Act 2008 c. 1 s.1 (February 19, 2008)

⁶ Word inserted by European Communities (Amendment) Act 1986 (c. 58), s. 1

⁷ S. 1(2)(g)(h) inserted by European Communities (Spanish and Portuguese Accession) Act 1985 (c. 75), s. 1

⁸ Added by European Communities (Amendment) Act 1993 c. 32 s.1(1) (July 23, 1993)

⁹ S. 1(2)(j) inserted by European Communities (Amendment) Act 1986 (c. 58), s. 1

¹⁰ Added by European Parliamentary Elections Act 1993 c. 41 s.3(2) (November 5, 1993)

¹¹ Added by European Economic Area Act 1993 c. 51 s.1 (November 5, 1993)

¹² Added by European Union (Accessions) Act 1994 c. 38 s.1 (November 3, 1994)

¹³ Added by European Communities (Amendment) Act 1998 c. 21 s.1 (June 11, 1998)

¹⁴ Added by European Communities (Amendment) Act 2002 c. 3 s.1(1) (February 26, 2002)

¹⁵ Added by European Union (Accessions) Act 2006 c. 2 s.1(1) (February 16, 2006)

- 16 Added by European Union (Accessions) Act 2003 c. 35 s.1(1) (November 13, 2003)
- 17 Added by European Union (Amendment) Act 2008 c. 7 s.2 (June 19, 2008)
- 18 Words substituted by Legislative and Regulatory Reform Act 2006 c. 51 Pt 3 s.27(1)(a) (January 8, 2007)
- 19 Words substituted by Legislative and Regulatory Reform Act 2006 c. 51 Pt 3 s.27(1)(b) (January 8, 2007)
- 20 Words repealed by Northern Ireland Constitution Act 1973 (c. 36), Sch. 6 Pt. I
- 21 Words substituted by European Communities (Amendment) Act 1986 (c. 58), s. 2(a)
- 22 Words inserted by European Communities (Amendment) Act 1986 (c. 58), s. 2(b)

APPENDIX 2

SELECTED PORTIONS OF THE GOVERNMENT'S WHITE PAPER

RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL

Chapter 1 - The Case for Change

The European Convention on Human Rights

1.1 The European Convention for the Protection of Human Rights and Fundamental Freedoms is a treaty of the Council of Europe. This institution was established at the end of the Second World War, as part of the Allies' programme to reconstruct durable civilisation on the mainland of Europe. The Council was established before the European Union and, although many nations are members of both, the two bodies are quite separate.

1.2 The United Kingdom played a major part in drafting the Convention, and there was a broad agreement between the major political parties about the need for it (one of its draftsmen later became, as Lord Kilmuir, Lord Chancellor in the Conservative Administration from 1954 to 1962). The United Kingdom was among the first group of countries to sign the Convention. It was the very first country to ratify it, in March 1951. In 1966 the United Kingdom accepted that an individual person, and not merely another State, could bring a case against the United Kingdom in Strasbourg (the home of the European Commission of Human Rights and Court of Human Rights, which were established by the Convention). Successive administrations in the United Kingdom have maintained these arrangements.

1.3 The European Convention is not the only international human rights agreement to which the United Kingdom and other like-minded countries are party, but over the years it has become one of the premier agreements defining standards of behaviour across Europe. It was also for many years unique because of the system which it put in place for people from signatory countries to take complaints to Strasbourg and for those complaints to be judicially determined. These arrangements are by now well tried and tested. The rights and freedoms which are guaranteed under the Convention are ones with which the people of this country are plainly comfortable. They therefore afford an excellent basis for the Human Rights Bill which we are now introducing.

1.4 The constitutional arrangements in most continental European countries have meant that their acceptance of the Convention went hand in hand with its incorporation into their domestic law. In this country it was long believed that the rights and freedoms guaranteed by the Convention could be delivered under our common law. In the last two decades, however, there has been a growing awareness that it is not sufficient to rely on the common law and that incorporation is necessary.

1.5 The Liberal Democrat Peer, Lord Lester of Herne Hill QC, recently introduced

two Bills on incorporation into the House of Lords (in 1994 and 1996). Before that, the then Conservative MP Sir Edward Gardner QC introduced a Private Member's Bill on incorporation into the House of Commons in 1987. At the time of introducing his Bill he commented on the language of the Articles in the Convention, saying: "It is language which echoes right down the corridors of history. It goes deep into our history and as far back as Magna Carta." (Hansard, 6 February 1987, col.1224). In preparing this White Paper the Government has paid close attention to earlier debates and proposals for incorporation.

The Convention rights

1.6 The Convention contains Articles which guarantee a number of basic human rights. They deal with the right to life (Article 2); torture or inhuman or degrading treatment or punishment (Article 3); slavery and forced labour (Article 4); liberty and security of person (Article 5); fair trial (Article 6); retrospective criminal laws (Article 7); respect for private and family life, home and correspondence (Article 8); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); freedom of peaceful assembly and freedom of association, including the right to join a trade union (Article 11); the right to marry and to found a family (Article 12); and discrimination in the enjoyment of these rights and freedoms (Article 14).

1.7 The United Kingdom is also a party to the First Protocol to the Convention, which guarantees the right to the peaceful enjoyment of possessions (Article 1), the right to education (Article 2) and the right to free elections (Article 3).

1.8 The rights in the Convention are set out in general terms, and they are subject in the Convention to a number of qualifications which are also of a general character. Some of these qualifications are set out in the substantive Articles themselves (see, for example, Article 10, concerning freedom of expression); others are set out in Articles 16 to 18 of the Convention. Sometimes too the rights guaranteed under the Convention need to be balanced against each other (for example, those guaranteed by Article 8 and Article 10).

Applications under the Convention

1.9 Anyone within the United Kingdom jurisdiction who is aggrieved by an action of the executive or by the effect of the existing law and who believes it is contrary to the European Convention can submit a petition to the European Commission of Human Rights. The Commission will first consider whether the petition is admissible. One of the conditions of admissibility is that the applicant must have gone through all the steps available to him or her at home for challenging the decision which he or she is complaining about. If the Commission decides that a complaint is admissible, and if a friendly settlement cannot be secured, it will send a confidential report to the Committee of Ministers of the Council of Europe, stating its opinion on whether there has been a violation. The matter may end there, with a decision by the Committee (which in practice always adopts the opinion of the Commission), or the case may be referred on to the European Court of Human Rights for consideration. If the Court finds that there has been a violation it may itself "afford just satisfaction" to the injured party by an award of damages or an

award of costs and expenses. The court may also find that a formal finding of a violation is sufficient. There is no appeal from the Court.

Effect of a Court judgment

1.10 A finding by the European Court of Human Rights of a violation of a Convention right does not have the effect of automatically changing United Kingdom law and practice: that is a matter for the United Kingdom Government and Parliament. But the United Kingdom, like all other States who are parties to the Convention, has agreed to abide by the decisions of the Court or (where the case has not been referred to the Court) the Committee of Ministers. It follows that, in cases where a violation has been found, the State concerned must ensure that any deficiency in its internal laws is rectified so as to bring them into line with the Convention. The State is responsible for deciding what changes are needed, but it must satisfy the Committee of Ministers that the steps taken are sufficient. Successive United Kingdom administrations have accepted these obligations in full.

Relationship to current law in the United Kingdom

1.11 When the United Kingdom ratified the Convention the view was taken that the rights and freedoms which the Convention guarantees were already, in substance, fully protected in British law. It was not considered necessary to write the Convention itself into British law, or to introduce any new laws in the United Kingdom in order to be sure of being able to comply with the Convention.

1.12 From the point of view of the **international** obligation which the United Kingdom was undertaking when it signed and ratified the Convention, this was understandable. Moreover, the European Court of Human Rights explicitly confirmed that it was not a necessary part of proper observance of the Convention that it should be incorporated into the laws of the States concerned.

1.13 However, since its drafting nearly 50 years ago, almost all the States which are party to the European Convention on Human Rights have gradually incorporated it into their domestic law in one way or another. Ireland and Norway have not done so, but Ireland has a Bill of Rights which guarantees rights similar to those guaranteed by the Convention and Norway is also in the process of incorporating the Convention. Several other countries with which we have close links and which share the common law tradition, such as Canada and New Zealand, have provided similar protection for human rights in their own legal systems.

The case for incorporation

1.14 The effect of non-incorporation on the British people is a very practical one. The rights, originally developed with major help from the United Kingdom Government, are no longer actually seen as British rights. And enforcing them takes too long and costs too much. It takes on average five years to get an action into the European Court of Human Rights once all domestic remedies have been exhausted; and it costs an average of £30,000. Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts - without this inordinate delay and cost. It will also mean that the rights will be brought much

more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law. And there will be another distinct benefit. British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.

1.15 Moreover, in the Government's view, the approach which the United Kingdom has so far adopted towards the Convention does not sufficiently reflect its importance and has not stood the test of time.

1.16 The most obvious proof of this lies in the number of cases in which the European Commission and Court have found that there have been violations of the Convention rights in the United Kingdom. The causes vary. The Government recognises that interpretations of the rights guaranteed under the Convention have developed over the years, reflecting changes in society and attitudes. Sometimes United Kingdom laws have proved to be inherently at odds with the Convention rights. On other occasions, although the law has been satisfactory, something has been done which our courts have held to be lawful by United Kingdom standards but which breaches the Convention. In other cases again, there has simply been no framework within which the compatibility with the Convention rights of an executive act or decision can be tested in the British courts: these courts can of course review the exercise of executive discretion, but they can do so only on the basis of what is lawful or unlawful according to the law in the United Kingdom as it stands. It is plainly unsatisfactory that someone should be the victim of a breach of the Convention standards by the State yet cannot bring any case at all in the British courts, simply because British law does not recognise the right in the same terms as one contained in the Convention.

1.17 For individuals, and for those advising them, the road to Strasbourg is long and hard. Even when they get there, the Convention enforcement machinery is subject to long delays. This might be convenient for a government which was half-hearted about the Convention and the right of individuals to apply under it, since it postpones the moment at which changes in domestic law or practice must be made. But it is not in keeping with the importance which this Government attaches to the observance of basic human rights.

Bringing Rights Home

1.18 We therefore believe that the time has come to enable people to enforce their Convention rights against the State in the British courts, rather than having to incur the delays and expense which are involved in taking a case to the European Human Rights Commission and Court in Strasbourg and which may altogether deter some people from pursuing their rights. Enabling courts in the United Kingdom to rule on the application of the Convention will also help to influence the development of case law on the Convention by the European Court of Human Rights on the basis of familiarity with our laws and customs and of sensitivity to practices and procedures in the United Kingdom. Our courts' decisions will provide the European Court with a useful source of information and reasoning for its own decisions. United Kingdom judges have a very high reputation internationally, but the fact that they do not deal in the same concepts as the European Court of Human Rights limits the extent to

which their judgments can be drawn upon and followed. Enabling the Convention rights to be judged by British courts will also lead to closer scrutiny of the human rights implications of new legislation and new policies. If legislation is enacted which is incompatible with the Convention, a ruling by the domestic courts to that effect will be much more direct and immediate than a ruling from the European Court of Human Rights. The Government of the day, and Parliament, will want to minimise the risk of that happening.

1.19 Our aim is a straightforward one. It is to make more directly accessible the rights which the British people already enjoy under the Convention. In other words, to bring those rights home.

Chapter 2 - The Government's Proposals for Enforcing the Convention Rights

2.1 The essential feature of the Human Rights Bill is that the United Kingdom will not be bound to give effect to the Convention rights merely as a matter of international law, but will also give them further effect directly in our domestic law. But there is more than one way of achieving this. This Chapter explains the choices which the Government has made for the Bill.

A new requirement on public authorities

2.2 Although the United Kingdom has an international obligation to comply with the Convention, there at present is no requirement in our domestic law on central and local government, or others exercising similar executive powers, to exercise those powers in a way which is compatible with the Convention. This Bill will change that by making it unlawful for public authorities to act in a way which is incompatible with the Convention rights. The definition of what constitutes a public authority is in wide terms. Examples of persons or organisations whose acts or omissions it is intended should be able to be challenged include central government (including executive agencies); local government; the police; immigration officers; prisons; courts and tribunals themselves; and, to the extent that they are exercising public functions, companies responsible for areas of activity which were previously within the public sector, such as the privatised utilities. The actions of Parliament, however, are excluded.

2.3 A person who is aggrieved by an act or omission on the part of a public authority which is incompatible with the Convention rights will be able to challenge the act or omission in the courts. The effects will be wide-ranging. They will extend both to legal actions which a public authority pursues against individuals (for example, where a criminal prosecution is brought or where an administrative decision is being

enforced through legal proceedings) and to cases which individuals pursue against a public authority (for example, for judicial review of an executive decision). Convention points will normally be taken in the context of proceedings instituted against individuals or already open to them, but, if none is available, it will be possible for people to bring cases on Convention grounds alone. Individuals or organisations seeking judicial review of decisions by public authorities on Convention grounds will need to show that they have been directly affected, as they must if they take a case to Strasbourg.

2.4 It is our intention that people or organisations should be able to argue that their Convention rights have been infringed by a public authority in our courts at any level. This will enable the Convention rights to be applied from the outset against the facts and background of a particular case, and the people concerned to obtain their remedy at the earliest possible moment. We think this is preferable to allowing cases to run their ordinary course but then referring them to some kind of separate constitutional court which, like the European Court of Human Rights, would simply review cases which had already passed through the regular legal machinery. In considering Convention points, our courts will be required to take account of relevant decisions of the European Commission and Court of Human Rights (although these will not be binding).

2.5 The Convention is often described as a "living instrument" because it is interpreted by the European Court in the light of present day conditions and therefore reflects changing social attitudes and the changes in the circumstances of society. In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention. In particular, our courts will be required to balance the protection of individuals' fundamental rights against the demands of the general interest of the community, particularly in relation to Articles 8-11 where a State may restrict the protected right to the extent that this is "necessary in a democratic society".

Remedies for a failure to comply with the Convention

2.6 A public authority which is found to have acted unlawfully by failing to comply with the Convention will not be exposed to criminal penalties. But the court or tribunal will be able to grant the injured person any remedy which is within its normal powers to grant and which it considers appropriate and just in the circumstances. What remedy is appropriate will of course depend both on the facts of the case and on a proper balance between the rights of the individual and the public interest. In some cases, the right course may be for the decision of the public authority in the particular case to be quashed. In other cases, the only appropriate remedy may be an award of damages. The Bill provides that, in considering an award of damages on Convention grounds, the courts are to take into account the principles applied by the European Court of

Human Rights in awarding compensation, so that people will be able to receive compensation from a domestic court equivalent to what they would have received in Strasbourg.

Interpretation of legislation

2.7 The Bill provides for legislation - both Acts of Parliament and secondary legislation - to be interpreted so far as possible so as to be compatible with the Convention. This goes far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so.

2.8 This "rule of construction" is to apply to past as well as to future legislation. To the extent that it affects the meaning of a legislative provision, the courts will not be bound by previous interpretations. They will be able to build a new body of case law, taking into account the Convention rights.

A declaration of incompatibility with the Convention rights

2.9 If the courts decide in any case that it is impossible to interpret an Act of Parliament in a way which is compatible with the Convention, the Bill enables a formal declaration to be made that its provisions are incompatible with the Convention. A declaration of incompatibility will be an important statement to make, and the power to make it will be reserved to the higher courts. They will be able to make a declaration in any proceedings before them, whether the case originated with them (as, in the High Court, on judicial review of an executive act) or in considering an appeal from a lower court or tribunal. The Government will have the right to intervene in any proceedings where such a declaration is a possible outcome. A decision by the High Court or Court of Appeal, determining whether or not such a declaration should be made, will itself be appealable.

Effect of court decisions on legislation

2.10 A declaration that legislation is incompatible with the Convention rights will not of itself have the effect of changing the law, which will continue to apply. But it will almost certainly prompt the Government and Parliament to change the law.

2.11 The Government has considered very carefully whether it would be right for the Bill to go further, and give to courts in the United Kingdom the power to set aside an Act of Parliament which they believe is incompatible with the Convention rights. In considering this question, we have looked at a number of models. The Canadian Charter of Rights and

Freedoms 1982 enables the courts to strike down any legislation which is inconsistent with the Charter, unless the legislation contains an explicit statement that it is to apply "notwithstanding" the provisions of the Charter. But legislation which has been struck down may be re-enacted with a "notwithstanding" clause. In New Zealand, on the other hand, although there was an earlier proposal for legislation on lines similar to the Canadian Charter, the human rights legislation which was eventually enacted after wide consultation took a different form. The New Zealand Bill of Rights Act 1990 is an "interpretative" statute which requires past and future legislation to be interpreted consistently with the rights contained in the Act as far as possible but provides that legislation stands if that is impossible. In Hong Kong, a middle course was adopted. The Hong Kong Bill of Rights Ordinance 1991 distinguishes between legislation enacted before and after the Ordinance took effect: previous legislation is subordinated to the provisions of the Ordinance, but subsequent legislation takes precedence over it.

2.12 The Government has also considered the European Communities Act 1972 which provides for European law, in cases where that law has "direct effect", to take precedence over domestic law. There is, however, an essential difference between European Community law and the European Convention on Human Rights, because it is a **requirement** of membership of the European Union that member States give priority to directly effective EC law in their own legal systems. There is no such requirement in the Convention.

2.13 The Government has reached the conclusion that courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the Government attaches to Parliamentary sovereignty. In this context, Parliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes. In enacting legislation, Parliament is making decisions about important matters of public policy. The authority to make those decisions derives from a democratic mandate. Members of Parliament in the House of Commons possess such a mandate because they are elected, accountable and representative. To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest that they desire this power, nor that the public wish them to have it. Certainly, this Government has no mandate for any such change.

2.14 It has been suggested that the courts should be able to uphold the rights in the Human Rights Bill in preference to any provisions of earlier legislation which are incompatible with those rights. This is on the basis

that a later Act of Parliament takes precedence over an earlier Act if there is a conflict. But the Human Rights Bill is intended to provide a new basis for judicial interpretation of all legislation, not a basis for striking down any part of it.

2.15 The courts will, however, be able to strike down or set aside secondary legislation which is incompatible with the Convention, unless the terms of the parent statute make this impossible. The courts can already strike down or set aside secondary legislation when they consider it to be outside the powers conferred by the statute under which it is made, and it is right that they should be able to do so when it is incompatible with the Convention rights and could have been framed differently.

Entrenchment

2.16 On one view, human rights legislation is so important that it should be given added protection from subsequent amendment or repeal. The Constitution of the United States of America, for example, guarantees rights which can be amended or repealed only by securing qualified majorities in both the House of Representatives and the Senate, and among the States themselves. But an arrangement of this kind could not be reconciled with our own constitutional traditions, which allow any Act of Parliament to be amended or repealed by a subsequent Act of Parliament. We do not believe that it is necessary or would be desirable to attempt to devise such a special arrangement for this Bill.

Amending legislation

2.17 Although the Bill does not allow the courts to set aside Acts of Parliament, it will nevertheless have a profound impact on the way that legislation is interpreted and applied, and it will have the effect of putting the issues squarely to the Government and Parliament for further consideration. It is important to ensure that the Government and Parliament, for their part, can respond quickly. In the normal way, primary legislation can be amended only by further primary legislation, and this can take a long time. Given the volume of Government business, an early opportunity to legislate may not arise; and the process of legislating is itself protracted. Emergency legislation can be enacted very quickly indeed, but it is introduced only in the most exceptional circumstances.

2.18 The Bill provides for a fast-track procedure for changing legislation in response either to a declaration of incompatibility by our own higher courts or to a finding of a violation of the Convention in Strasbourg. The appropriate Government Minister will be able to amend the legislation by Order so as to make it compatible with the Convention. The Order will be subject to approval by both Houses of Parliament before taking effect, except where the need to amend the legislation is particularly urgent,

when the Order will take effect immediately but will expire after a short period if not approved by Parliament.

2.19 There are already precedents for using secondary legislation to amend primary legislation in some circumstances, and we think the use of such a procedure is acceptable in this context and would be welcome as a means of improving the observance of human rights. Plainly the Minister would have to exercise this power only in relation to the provisions which contravene the Convention, together with any necessary consequential amendments. In other words, Ministers would not have carte blanche to amend unrelated parts of the Act in which the breach is discovered.

Scotland

2.20 In Scotland, the position with regard to Acts of the Westminster Parliament will be the same as in England and Wales. All courts will be required to interpret the legislation in a way which is compatible with the Convention so far as possible. If a provision is found to be incompatible with the Convention, the Court of Session or the High Court will be able to make a declarator to that effect, but this will not affect the validity or continuing operation of the provision.

2.21 The position will be different, however, in relation to Acts of the Scottish Parliament when it is established. The Government has decided that the Scottish Parliament will have no power to legislate in a way which is incompatible with the Convention; and similarly that the Scottish Executive will have no power to make subordinate legislation or to take executive action which is incompatible with the Convention. It will accordingly be possible to challenge such legislation and actions in the Scottish courts on the ground that the Scottish Parliament or Executive has incorrectly applied its powers. If the challenge is successful then the legislation or action would be held to be unlawful. As with other issues concerning the powers of the Scottish Parliament, there will be a procedure for inferior courts to refer such issues to the superior Scottish courts; and those courts in turn will be able to refer the matter to the Judicial Committee of the Privy Council. If such issues are decided by the superior Scottish courts, an appeal from their decision will be to the Judicial Committee. These arrangements are in line with the Government's general approach to devolution.

Wales

2.22 Similarly, the Welsh Assembly will not have power to make subordinate legislation or take executive action which is incompatible with the Convention. It will be possible to challenge such legislation and action in the courts, and for them to be quashed, on the ground that the Assembly has exceeded its powers.

Northern Ireland

2.23 Acts of the Westminster Parliament will be treated in the same way in Northern Ireland as in the rest of the United Kingdom. But Orders in Council and other related legislation will be treated as subordinate legislation. In other words, they will be struck down by the courts if they are incompatible with the Convention. Most such legislation is a temporary means of enacting legislation which would otherwise be done by measures of a devolved Northern Ireland legislature.

Chapter 3 - Improving Compliance with the Convention Rights

3.1 The enforcement of Convention rights will be a matter for the courts, whilst the Government and Parliament will have the different but equally important responsibility of revising legislation where necessary. But it is also highly desirable for the Government to ensure as far as possible that legislation which it places before Parliament in the normal way is compatible with the Convention rights, and for Parliament to ensure that the human rights implications of legislation are subject to proper consideration before the legislation is enacted.

Government legislation

3.2 The Human Rights Bill introduces a new procedure to make the human rights implications of proposed Government legislation more transparent. The responsible Minister will be required to provide a statement that in his or her view the proposed Bill is compatible with the Convention. The Government intends to include this statement alongside the Explanatory and Financial Memorandum which accompanies a Bill when it is introduced into each House of Parliament.

3.3 There may be occasions where such a statement cannot be provided, for example because it is essential to legislate on a particular issue but the policy in question requires a risk to be taken in relation to the Convention, or because the arguments in relation to the Convention issues raised are not clear-cut. In such cases, the Minister will indicate that he or she cannot provide a positive statement but that the Government nevertheless wishes Parliament to proceed to consider the Bill. Parliament would expect the Minister to explain his or her reasons during the normal course of the proceedings on the Bill. This will ensure that the human rights implications are debated at the earliest opportunity.

Consideration of draft legislation within Government

3.4 The new requirement to make a statement about the compliance of draft legislation with the Convention will have a significant and

beneficial impact on the preparation of draft legislation within Government before its introduction into Parliament. It will ensure that all Ministers, their departments and officials are fully seized of the gravity of the Convention's obligations in respect of human rights. But we also intend to strengthen collective Government procedures so as to ensure that a proper assessment is made of the human rights implications when collective approval is sought for a new policy, as well as when any draft Bill is considered by Ministers. Revised guidance to Departments on these procedures will, like the existing guidance, be publicly available.

3.5 Some central co-ordination will also be extremely desirable in considering the approach to be taken to Convention points in criminal or civil proceedings, or in proceedings for judicial review, to which a Government department is a party. This is likely to require an inter-departmental group of lawyers and administrators meeting on a regular basis to ensure that a consistent approach is taken and to ensure that developments in case law are well understood by all those in Government who are involved in proceedings on Convention points. We do not, however, see any need to make a particular Minister responsible for promoting human rights across Government, or to set up a separate new Unit for this purpose. The responsibility for complying with human rights requirements rests on the Government as a whole.

A Parliamentary Committee on Human Rights

3.6 *Bringing Rights Home* suggested that "Parliament itself should play a leading role in protecting the rights which are at the heart of a parliamentary democracy". How this is achieved is a matter for Parliament to decide, but in the Government's view the best course would be to establish a new Parliamentary Committee with functions relating to human rights. This would not require legislation or any change in Parliamentary procedure. There could be a Joint Committee of both Houses of Parliament or each House could have its own Committee; or there could be a Committee which met jointly for some purposes and separately for others.

3.7 The new Committee might conduct enquiries on a range of human rights issues relating to the Convention, and produce reports so as to assist the Government and Parliament in deciding what action to take. It might also want to range more widely, and examine issues relating to the other international obligations of the United Kingdom such as proposals to accept new rights under other human rights treaties.

Should there be a Human Rights Commission?

3.8 *Bringing Rights Home* canvassed views on the establishment of a Human Rights Commission, and this possibility has received a good

deal of attention. No commitment to establish a Commission was, however, made in the Manifesto on which the Government was elected. The Government's priority is implementation of its Manifesto commitment to give further effect to the Convention rights in domestic law so that people can enforce those rights in United Kingdom courts. Establishment of a new Human Rights Commission is not central to that objective and does not need to form part of the current Bill.

3.9 Moreover, the idea of setting up a new human rights body is not universally acclaimed. Some reservations have been expressed, particularly from the point of view of the impact on existing bodies concerned with particular aspects of human rights, such as the Commission for Racial Equality and the Equal Opportunities Commission, whose primary concern is to protect the rights for which they were established. A quinquennial review is currently being conducted of the Equal Opportunities Commission, and the Government has also decided to establish a new Disability Rights Commission.

3.10 The Government's conclusion is that, before a Human Rights Commission could be established by legislation, more consideration needs to be given to how it would work in relation to such bodies, and to the new arrangements to be established for Parliamentary and Government scrutiny of human rights issues. This is necessary not only for the purposes of framing the legislation but also to justify the additional public expenditure needed to establish and run a new Commission. A range of organisational issues need more detailed consideration before the legislative and financial case for a new Commission is made, and there needs to be a greater degree of consensus on an appropriate model among existing human rights bodies.

3.11 However, the Government has not closed its mind to the idea of a new Human Rights Commission at some stage in the future in the light of practical experience of the working of the new legislation. If Parliament establishes a Committee on Human Rights, one of its main tasks might be to conduct an inquiry into whether a Human Rights Commission is needed and how it should operate. The Government would want to give full weight to the Committee's report in considering whether to create a statutory Human Rights Commission in future.

3.12 It has been suggested that a new Commission might be funded from non- Government sources. The Government would not wish to deter a move towards a non- statutory, privately- financed body if its role was limited to functions such as public education and advice to individuals. However, a non-statutory body could not absorb any of the functions of the existing statutory bodies concerned with aspects

of human rights.

APPENDIX 3
THE HUMAN RIGHTS ACT 1998
(WITHOUT THE SCHEDULES)

An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes.

[9th November 1998]

Introduction

1.— The Convention Rights.

(1) In this Act “the Convention rights” means the rights and fundamental freedoms set out in—

(a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol, and

(c) [Article 1 of the Thirteenth Protocol]¹, as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

(4) The [Secretary of State]² may by order make such amendments to this Act as he considers appropriate to reflect the effect, in relation to the United Kingdom, of a protocol.

(5) In subsection (4) “protocol” means a protocol to the Convention—

(a) which the United Kingdom has ratified; or

(b) which the United Kingdom has signed with a view to ratification.

(6) No amendment may be made by an order under subsection (4) so as to come into force before the protocol concerned is in force in relation to the United Kingdom.

2.— Interpretation of Convention rights.

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(3) In this section “rules” means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section—

(a) by [the Lord Chancellor or] ³ [...] ⁴ the Secretary of State, in relation to any proceedings outside Scotland;

(b) by the Secretary of State, in relation to proceedings in Scotland; or

(c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland—

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force.

Legislation

3.— Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of

any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

4.— Declaration of incompatibility.

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied—

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.

(5) In this section “court” means —

[(a) the Supreme Court;]⁵

(b) the Judicial Committee of the Privy Council;

(c) the [Court Martial Appeal Court]⁶;

(d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;

(e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal [;]⁷

[(f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the Vice-Chancellor or a puisne judge of the High Court.]⁷

(6) A declaration under this section (“a declaration of incompatibility”)—

(a) does not affect the validity, continuing operation or enforcement of

the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

5.— Right of Crown to intervene.

(1) Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court.

(2) In any case to which subsection (1) applies—

(a) a Minister of the Crown (or a person nominated by him),

(b) a member of the Scottish Executive,

(c) a Northern Ireland Minister,

(d) a Northern Ireland department,

is entitled, on giving notice in accordance with rules of court, to be joined as a party to the proceedings.

(3) Notice under subsection (2) may be given at any time during the proceedings.

(4) A person who has been made a party to criminal proceedings (other than in Scotland) as the result of a notice under subsection (2) may, with leave, appeal to the [Supreme Court] ^s against any declaration of incompatibility made in the proceedings.

(5) In subsection (4)—

“criminal proceedings” includes all proceedings before the [Court Martial Appeal Court]⁹; and

“leave” means leave granted by the court making the declaration of incompatibility or by the [Supreme Court]^s.

Public authorities

6.— Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the

authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section “public authority” includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) [...] ¹⁰

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) “An act” includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

7.— Proceedings.

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) “appropriate court or tribunal” means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceedings.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

(4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and

interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.

(5) Proceedings under subsection (1)(a) must be brought before the end of—

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances, but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) “legal proceedings” includes—

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

(8) Nothing in this Act creates a criminal offence.

(9) In this section “rules” means —

(a) in relation to proceedings before a court or tribunal outside Scotland, rules made by [...] ¹¹ the [the Lord Chancellor or] ¹² Secretary of State for the purposes of this section or rules of court,

(b) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes,

(c) in relation to proceedings before a tribunal in Northern Ireland—

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force, rules made by a Northern Ireland department for those purposes, and includes provision made by order under section 1 of the Courts and Legal Services Act 1990.

(10) In making rules, regard must be had to section 9.

(11) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to—

(a) the relief or remedies which the tribunal may grant; or

(b) the grounds on which it may grant any of them.

(12) An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.

(13) “The Minister” includes the Northern Ireland department concerned.

8.— Judicial remedies.

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

(5) A public authority against which damages are awarded is to be

treated—

(a) in Scotland, for the purposes of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;

(b) for the purposes of the Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.

(6) In this section—

“court” includes a tribunal;

“damages” means damages for an unlawful act of a public authority;
and

“unlawful” means unlawful under section 6(1).

9.— Judicial acts.

(1) Proceedings under section 7(1)(a) in respect of a judicial act may be brought only—

(a) by exercising a right of appeal;

(b) on an application (in Scotland a petition) for judicial review; or

(c) in such other forum as may be prescribed by rules.

(2) That does not affect any rule of law which prevents a court from being the subject of judicial review.

(3) In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention.

(4) An award of damages permitted by subsection (3) is to be made against the Crown; but no award may be made unless the appropriate person, if not a party to the proceedings, is joined.

(5) In this section—

“appropriate person” means the Minister responsible for the court concerned, or a person or government department nominated by him;

“court” includes a tribunal;

“judge” includes a member of a tribunal, a justice of the peace and a

clerk or other officer entitled to exercise the jurisdiction of a court;

“judicial act” means a judicial act of a court and includes an act done on the instructions, or on behalf, of a judge; and

“rules” has the same meaning as in section 7(9).

Remedial action

10.— Power to take remedial action.

(1) This section applies if—

(a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies—

(i) all persons who may appeal have stated in writing that they do not intend to do so;

(ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or

(iii) an appeal brought within that time has been determined or abandoned; or

(b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to
a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.

(3) If, in the case of subordinate legislation, a Minister of the Crown considers—

(a) that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and

(b) that there are compelling reasons for proceeding under this section, he may by order make such amendments to the primary legislation as he considers necessary.

(4) This section also applies where the provision in question is in

subordinate legislation and has been quashed, or declared invalid, by reason of incompatibility with a Convention right and the Minister proposes to proceed under paragraph 2(b) of Schedule 2.

(5) If the legislation is an Order in Council, the power conferred by subsection (2) or (3) is exercisable by Her Majesty in Council.

(6) In this section “legislation” does not include a Measure of the Church Assembly or of the General Synod of the Church of England.

(7) Schedule 2 makes further provision about remedial orders.

Other rights and proceedings

11. Safeguard for existing human rights.

A person's reliance on a Convention right does not restrict—

(a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or

(b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9.

12.— Freedom of expression.

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied—

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section—

“court” includes a tribunal; and

“relief” includes any remedy or order (other than in criminal proceedings).

13.— Freedom of thought, conscience and religion.

(1) If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

(2) In this section “court” includes a tribunal.

Derogations and reservations

14.— Derogations.

[(1) In this Act “designated derogation” means any derogation by the United Kingdom from an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the [Secretary of State]¹³ .]¹⁴

(2) [...] ¹⁵

(3) If a designated derogation is amended or replaced it ceases to be a designated derogation.

(4) But subsection (3) does not prevent the [Secretary of State]¹³ from exercising his power under subsection (1) [...] ¹⁶ to make a fresh designation order in respect of the Article concerned.

(5) The [Secretary of State]¹³ must by order make such amendments to Schedule 3 as he considers appropriate to reflect—

(a) any designation order; or

(b) the effect of subsection (3).

(6) A designation order may be made in anticipation of the making by the United Kingdom of a proposed derogation.

15.— Reservations.

(1) In this Act “designated reservation” means—

(a) the United Kingdom's reservation to Article 2 of the First Protocol to the Convention; and

(b) any other reservation by the United Kingdom to an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the [Secretary of State]¹⁷.

(2) The text of the reservation referred to in subsection (1)(a) is set out in Part II of Schedule 3.

(3) If a designated reservation is withdrawn wholly or in part it ceases to be a designated reservation.

(4) But subsection (3) does not prevent the [Secretary of State]¹⁷ from exercising his power under subsection (1)(b) to make a fresh designation order in respect of the Article concerned.

(5) The [Secretary of State]¹⁷ must by order make such amendments to this Act as he considers appropriate to reflect—

(a) any designation order; or

(b) the effect of subsection (3).

16.— Period for which designated derogations have effect.

[(1) If it has not already been withdrawn by the United Kingdom, a designated derogation ceases to have effect for the purposes of this Act, at the end of the period of five years beginning with the date on which the order designating it was made.]¹⁸

(2) At any time before the period—

(a) fixed by subsection (1) [...] ¹⁹, or

(b) extended by an order under this subsection,

comes to an end, the [Secretary of State]²⁰ may by order extend it by a

further period of five years.

(3) An order under [section 14(1)]²¹ ceases to have effect at the end of the period for consideration, unless a resolution has been passed by each House approving the order.

(4) Subsection (3) does not affect—

(a) anything done in reliance on the order; or

(b) the power to make a fresh order under section 14(1) [...] ²².

(5) In subsection (3) “period for consideration” means the period of forty days beginning with the day on which the order was made.

(6) In calculating the period for consideration, no account is to be taken of any time during which—

(a) Parliament is dissolved or prorogued; or

(b) both Houses are adjourned for more than four days.

(7) If a designated derogation is withdrawn by the United Kingdom, the [Secretary of State] ²⁰ must by order make such amendments to this Act as he considers are required to reflect that withdrawal.

17.— Periodic review of designated reservations.

(1) The appropriate Minister must review the designated reservation referred to in section 15(1)(a)—

(a) before the end of the period of five years beginning with the date on which section 1(2) came into force; and

(b) if that designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).

(2) The appropriate Minister must review each of the other designated reservations (if any)—

(a) before the end of the period of five years beginning with the date on which the order designating the reservation first came into force; and

(b) if the designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).

(3) The Minister conducting a review under this section must prepare

a report on the result of the review and lay a copy of it before each House of Parliament.

Judges of the European Court of Human Rights

18.— Appointment to European Court of Human Rights.

(1) In this section “judicial office” means the office of—

(a) Lord Justice of Appeal, Justice of the High Court or Circuit judge, in England and Wales;

(b) judge of the Court of Session or sheriff, in Scotland;

(c) Lord Justice of Appeal, judge of the High Court or county court judge, in Northern Ireland.

(2) The holder of a judicial office may become a judge of the European Court of Human Rights (“the Court”) without being required to relinquish his office.

(3) But he is not required to perform the duties of his judicial office while he is a judge of the Court.

(4) In respect of any period during which he is a judge of the Court—

(a) a Lord Justice of Appeal or Justice of the High Court is not to count as a judge of the relevant court for the purposes of [section 2(1) or 4(1) of the Senior Courts Act 1981] ²³ (maximum number of judges) nor as a judge of the [Senior Courts] ²⁴ for the purposes of section 12(1) to (6) of that Act (salaries etc.);

(b) a judge of the Court of Session is not to count as a judge of that court for the purposes of section 1(1) of the Court of Session Act 1988 (maximum number of judges) or of section 9(1)(c) of the Administration of Justice Act 1973 (“the 1973 Act”) (salaries etc.);

(c) a Lord Justice of Appeal or judge of the High Court in Northern Ireland is not to count as a judge of the relevant court for the purposes of section 2(1) or 3(1) of the Judicature (Northern Ireland) Act 1978 (maximum number of judges) nor as a judge of the [Court of Judicature]²⁵ of Northern Ireland for the purposes of section 9(1)(d) of the 1973 Act (salaries etc.);

(d) a Circuit judge is not to count as such for the purposes of section 18 of the Courts Act 1971 (salaries etc.);

(e) a sheriff is not to count as such for the purposes of section 14 of the Sheriff Courts (Scotland) Act 1907 (salaries etc.);

(f) a county court judge of Northern Ireland is not to count as such for

the purposes of section 106 of the County Courts Act (Northern Ireland) 1959 (salaries etc.).

(5) If a sheriff principal is appointed a judge of the Court, section 11(1) of the Sheriff Courts (Scotland) Act 1971 (temporary appointment of sheriff principal) applies, while he holds that appointment, as if his office is vacant.

(6) Schedule 4 makes provision about judicial pensions in relation to the holder of a judicial office who serves as a judge of the Court.

(7) The Lord Chancellor or the Secretary of State may by order make such transitional provision (including, in particular, provision for a temporary increase in the maximum number of judges) as he considers appropriate in relation to any holder of a judicial office who has completed his service as a judge of the Court.

[(7A) The following paragraphs apply to the making of an order under subsection (7) in relation to any holder of a judicial office listed in subsection (1)(a)–

(a) before deciding what transitional provision it is appropriate to make, the person making the order must consult the Lord Chief Justice of England and Wales;

(b) before making the order, that person must consult the Lord Chief Justice of England and Wales.

(7B) The following paragraphs apply to the making of an order under subsection (7) in relation to any holder of a judicial office listed in subsection (1)(c)–

(a) before deciding what transitional provision it is appropriate to make, the person making the order must consult the Lord Chief Justice of Northern Ireland;

(b) before making the order, that person must consult the Lord Chief Justice of Northern Ireland.

(7C) The Lord Chief Justice of England and Wales may nominate a judicial office holder (within the meaning of section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under this section.

(7D) The Lord Chief Justice of Northern Ireland may nominate any of the following to exercise his functions under this section–

(a) the holder of one of the offices listed in Schedule 1 to the Justice (Northern Ireland) Act 2002;

(b) a Lord Justice of Appeal (as defined in section 88 of that Act).
]²⁶

Parliamentary procedure

19.— Statements of compatibility.

(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

Supplemental

20.— Orders etc. under this Act.

(1) Any power of a Minister of the Crown to make an order under this Act is exercisable by statutory instrument.

(2) The power of [the Lord Chancellor or]²⁷ [...] ²⁸ the Secretary of State to make rules (other than rules of court) under section 2(3) or 7(9) is exercisable by statutory instrument.

(3) Any statutory instrument made under section 14, 15 or 16(7) must be laid before Parliament.

(4) No order may be made by [the Lord Chancellor or] ²⁷ [...] ²⁸ the Secretary of State under section 1(4), 7(11) or 16(2) unless a draft of the order has been laid before, and approved by, each House of Parliament.

(5) Any statutory instrument made under section 18(7) or Schedule 4, or to which subsection (2) applies, shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) The power of a Northern Ireland department to make—

(a) rules under section 2(3)(c) or 7(9)(c), or

(b) an order under section 7(11),

is exercisable by statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979.

(7) Any rules made under section 2(3)(c) or 7(9)(c) shall be subject to negative resolution; and section 41(6) of the Interpretation Act (Northern Ireland) 1954 (meaning of “subject to negative resolution”) shall apply as if the power to make the rules were conferred by an Act of the Northern Ireland Assembly.

(8) No order may be made by a Northern Ireland department under section 7(11) unless a draft of the order has been laid before, and approved by, the Northern Ireland Assembly.

21.— Interpretation, etc.

(1) In this Act—

“amend” includes repeal and apply (with or without modifications);

“the appropriate Minister” means the Minister of the Crown having charge of the appropriate authorised government department (within the meaning of the Crown Proceedings Act 1947);

“the Commission” means the European Commission of Human Rights;

“the Convention” means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 as it has effect for the time being in relation to the United Kingdom;

“declaration of incompatibility” means a declaration under section 4;

“Minister of the Crown” has the same meaning as in the Ministers of the Crown Act 1975;

“Northern Ireland Minister” includes the First Minister and the deputy First Minister in Northern Ireland;

“primary legislation” means any—

(a) public general Act;

(b) local and personal Act;

(c) private Act;

(d) Measure of the Church Assembly;

(e) Measure of the General Synod of the Church of England;

(f) Order in Council—

(i) made in exercise of Her Majesty's Royal Prerogative;

(ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or

(iii) amending an Act of a kind mentioned in paragraph (a), (b) or (c); and includes an order or other instrument made under primary legislation (otherwise than by the [Welsh Ministers, the First Minister for Wales, the Counsel General to the Welsh Assembly Government]²⁹, a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland department) to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation;

“the First Protocol” means the protocol to the Convention agreed at Paris on 20th March 1952; [...] ³⁰

“the Eleventh Protocol” means the protocol to the Convention (restructuring the control machinery established by the Convention) agreed at Strasbourg on 11th May 1994;

[“the Thirteenth Protocol” means the protocol to the Convention (concerning the abolition of the death penalty in all circumstances) agreed at Vilnius on 3rd May 2002;]³¹

“remedial order” means an order under section 10;

“subordinate legislation” means any—

(a) Order in Council other than one—

(i) made in exercise of Her Majesty's Royal Prerogative;

(ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or

(iii) amending an Act of a kind mentioned in the definition of primary legislation;

(b) Act of the Scottish Parliament;

[(ba) Measure of the National Assembly for Wales;

(bb) Act of the National Assembly for Wales;]³²

(c) Act of the Parliament of Northern Ireland;

(d) Measure of the Assembly established under section 1 of the Northern Ireland Assembly Act 1973;

(e) Act of the Northern Ireland Assembly;

(f) order, rules, regulations, scheme, warrant, byelaw or other instrument made under primary legislation (except to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation);

(g) order, rules, regulations, scheme, warrant, byelaw or other instrument made under legislation mentioned in paragraph (b), (c), (d) or (e) or made under an Order in Council applying only to Northern Ireland;

(h) order, rules, regulations, scheme, warrant, byelaw or other instrument made by a member of the Scottish Executive, [Welsh Ministers, the First Minister for Wales, the Counsel General to the Welsh Assembly Government,] ³³ a Northern Ireland Minister or a Northern Ireland department in exercise of prerogative or other executive functions of Her Majesty which are exercisable by such a person on behalf of Her Majesty;

“transferred matters” has the same meaning as in the Northern Ireland Act 1998; and

“tribunal” means any tribunal in which legal proceedings may be brought.

(2) The references in paragraphs (b) and (c) of section 2(1) to Articles are to Articles of the Convention as they had effect immediately before the coming into force of the Eleventh Protocol.

(3) The reference in paragraph (d) of section 2(1) to Article 46 includes a reference to Articles 32 and 54 of the Convention as they had effect immediately before the coming into force of the Eleventh Protocol.

(4) The references in section 2(1) to a report or decision of the Commission or a decision of the Committee of Ministers include references to a report or decision made as provided by paragraphs 3, 4 and 6 of Article 5 of the Eleventh Protocol (transitional provisions).

(5) [...] ³⁴

22.— Short title, commencement, application and extent.

(1) This Act may be cited as the Human Rights Act 1998.

(2) Sections 18, 20 and 21(5) and this section come into force on the passing of this Act.

(3) The other provisions of this Act come into force on such days as the Secretary of State may by order appoint; and different days may be appointed for different purposes.

(4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.

(5) This Act binds the Crown.

(6) This Act extends to Northern Ireland.

(7) [...] ³⁵

NOTES

¹ Words substituted by Human Rights Act 1998 (Amendment) Order 2004/1574 art.2(1) (June 22, 2004)

² Words substituted by Secretary of State for Constitutional Affairs Order 2003/1887 Sch.2 para.10(1) (August 19, 2003)

³ Words inserted by Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005/3429 Sch.1 para.3 (January 12, 2006)

⁴ Words repealed by Secretary of State for Constitutional Affairs Order 2003/1887 Sch.2 para.10(2) (August 19, 2003)

⁵ Substituted by Constitutional Reform Act 2005 c. 4 Sch.9(1) para.66(2) (October 1, 2009)

⁶ Words substituted by Armed Forces Act 2006 c. 52 Sch.16 para.156 (October 31, 2009)

⁷ Added by Mental Capacity Act 2005 c. 9 Sch.6 para.43 (October 1, 2007)

⁸ Words substituted by Constitutional Reform Act 2005 c. 4 Sch.9(1) para.66(3) (October 1, 2009)

⁹ Words substituted by Armed Forces Act 2006 c. 52 Sch.16 para.157 (October 31, 2009)

- 10 Repealed by Constitutional Reform Act 2005 c. 4 Sch.18(5) para.1 (October 1, 2009)
- 11 Words repealed by Secretary of State for Constitutional Affairs Order 2003/1887 Sch.2 para.10(2) (August 19, 2003)
- 12 Words inserted by Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005/3429 Sch.1 para.3 (January 12, 2006)
- 13 Words substituted by Secretary of State for Constitutional Affairs Order 2003/1887 Sch.2 para.10(1) (August 19, 2003)
- 14 Existing s.14(1)(a) is repealed and s.14(1)(b) is restructured by Human Rights Act (Amendment) Order 2001/1216 art.2(a) (April 1, 2001)
- 15 Repealed by Human Rights Act (Amendment) Order 2001/1216 art.2(b) (April 1, 2001)
- 16 Reference to "(b)" repealed by Human Rights Act (Amendment) Order 2001/1216 art.2(c) (April 1, 2001)
- 17 Words substituted by Secretary of State for Constitutional Affairs Order 2003/1887 Sch.2 para.10(1) (August 19, 2003)
- 18 Existing s.16(1)(a)-(b) repealed and remaining text is restructured by Human Rights Act (Amendment) Order 2001/1216 art.3(a) (April 1, 2001)
- 19 Reference to "(a)" and "(b)" repealed by Human Rights Act (Amendment) Order 2001/1216 art.3(b) (April 1, 2001)
- 20 Words substituted by Secretary of State for Constitutional Affairs Order 2003/1887 Sch.2 para.10(1) (August 19, 2003)
- 21 Reference to "(b)" repealed by Human Rights Act (Amendment) Order 2001/1216 art.3(c) (April 1, 2001)
- 22 Reference to "(b)" repealed by Human Rights Act (Amendment) Order 2001/1216 art.3(d) (April 1, 2001)
- 23 Words substituted by Constitutional Reform Act 2005 c. 4 Sch.11(1) para.1(2) (October 1, 2009)
- 24 Words substituted by Constitutional Reform Act 2005 c. 4 Sch.11(2) para.4(1) (October 1, 2009)
- 25 Words substituted by Constitutional Reform Act 2005 c. 4 Sch.11(3) para.6(1)
- 26 Added by Constitutional Reform Act 2005 c. 4 Sch.4(1) para.278 (April 3, 2006)
- 27 Words inserted by Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005/3429 Sch.1 para.3 (January 12, 2006)
- 28 Words repealed by Secretary of State for Constitutional Affairs Order 2003/1887 Sch.2 para.10(2) (August 19, 2003)
- 29 Words substituted by Government of Wales Act 2006 c. 32 Sch.10 para.56(2) (May 3, 2007 immediately after the ordinary election as specified in 2006 c.32 s.161(1); May 25, 2007 immediately after the end of the initial period for purposes of functions of the Welsh Ministers, the First Minister, the Counsel General and the

Assembly Commission and in relation to the Auditor General and the Comptroller and Auditor General as specified in 2006 c.32 s.161(4)-(5))

30 Definition repealed by Human Rights Act 1998 (Amendment) Order 2004/1574 art.2(2) (June 22, 2004)

31 Definition inserted by Human Rights Act 1998 (Amendment) Order 2004/1574 art.2(2) (June 22, 2004)

32 Added by Government of Wales Act 2006 c. 32 Sch.10 para.56(3) (May 3, 2007 immediately after the ordinary election as specified in 2006 c.32 s.161(1); May 25, 2007 immediately after the end of the initial period for purposes of functions of the Welsh Ministers, the First Minister, the Counsel General and the Assembly Commission and in relation to the Auditor General and the Comptroller and Auditor General as specified in 2006 c.32 s.161(4)-(5))

33 Words inserted by Government of Wales Act 2006 c. 32 Sch.10 para.56(4) (May 3, 2007 immediately after the ordinary election as specified in 2006 c.32 s.161(1); May 25, 2007 immediately after the end of the initial period for purposes of functions of the Welsh Ministers, the First Minister, the Counsel General and the Assembly Commission and in relation to the Auditor General and the Comptroller and Auditor General as specified in 2006 c.32 s.161(4)-(5))

34 Repealed by Armed Forces Act 2006 c. 52 Sch.17 para.1 (October 31, 2009 as SI 2009/1167)

35 Repealed by Armed Forces Act 2006 c. 52 Sch.17 para.1 (October 31, 2009 as SI 2009/1167)

APPENDIX 4

SECTION 41, YOUTH JUSTICE AND CRIMINAL EVIDENCE

ACT 1999

“41. — Restriction on evidence or questions about complainant's sexual history.

(2) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—

(a) no evidence may be adduced, and

(b) no question may be asked in cross-examination, by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

(3) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—

(a) that subsection (3) or (5) applies, and

(b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

(4) This subsection applies if the evidence or question relates to a relevant issue in the case and either

(a) that issue is not an issue of consent; or

(b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or

(c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—

(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

(ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This subsection applies if the evidence or question—

(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).

(7) Where this section applies in relation to a trial by virtue of the fact that one or more of a number of persons charged in the proceedings is

or are charged with a sexual offence—

- (a) it shall cease to apply in relation to the trial if the prosecutor decides not to proceed with the case against that person or those persons in respect of that charge; but
- (b) it shall not cease to do so in the event of that person or those persons pleading guilty to, or being convicted of, that charge.

(8) Nothing in this section authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this section.”

LEGISLATIVE HISTORY

Before 1976, there was no statutory regulation of evidence of a complainant’s sexual history in rape trials.

However, at common law, in a rape trial, evidence that the complainant had had sexual relations with either the defendant or other men was regarded as relevant to the issue of the credibility of the complainant. Accordingly, the complainant could be cross-examined as to her sexual history.⁶⁹⁸

⁶⁹⁸ However, her answers were final and could not be rebutted by contrary evidence.

Those who sought to adduce evidence of the sexual history of rape victims appeared to play on what has been described as the twin myths, “that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief.”⁶⁹⁹

The situation of the rape complainant became more precarious with the House of Lords’ decision in the case of *Director of Public Prosecutions v Morgan*.⁷⁰⁰ In that case, the House held that a subjective honest (even if unreasonable) belief on the part of the defendant that the complainant did consent to the sexual intercourse could be a viable defence.

With this decision, it appeared that the sexual history of rape complainants would become something of a sought-after object of value for bolstering the defence of belief in the consent of the complainant. The risk that women who had suffered rape could go through a second agony of harassment in the course of the rape trial by having their sexual history unnecessarily probed by defence lawyers appeared inevitable.

Following the *Morgan* case, the Government set up the Advisory Group on the Law of Rape headed by Rose Heilbron. The Group produced the so-called Heilbron Report.⁷⁰¹ It criticised the frequent use of evidence of the complainant’s sexual history in rape trials. It advised that while

⁶⁹⁹ See *R v Seaboyer* (1991) 83 DLR (4th) 193, 258, 278C, per McLachlin, J., cited by Lord Steyn in *R v A* (No.2) [2001] UKHL 25; [2001] 2 WLR 1546; [2002], at paragraph 27 of the judgment.

⁷⁰⁰ [1976] AC 182

⁷⁰¹ The Heilbron Committee (1975). Report of the Advisory Group on the Law of Rape. **Commd 6352**.

evidence of the sexual history of the complainant with the defendant himself might be potentially relevant, that with respect to persons other than the defendant was generally irrelevant and should not be allowed save in certain circumstances.

The only exception to the admissibility of the complainant's sexual history with third parties should be where the sexual history related to an alleged sexual behaviour of the complainant which was so "strikingly similar" to the sexual behaviour of the complainant at the event which was the subject of the subsisting charge, and the court was of the opinion that the evidence was so relevant to the defence of the defendant that excluding it might render the trial unfair.

In addition to the above, the Advisory Group also recommended that evidence of the complainant's sexual history should also be allowed for the purpose of rebutting evidence of sexual behaviour put forward by the prosecution.

Following this Report, the Sexual Offences (Amendment) Act 1976⁷⁰² was enacted.

It is noteworthy that evidence of the sexual history of the complainant with the defendant himself remained statutorily unregulated even under

⁷⁰² Repealed in SI 2000/3075 art 3 by the Youth Justice and Criminal Evidence Act 1999, schedule 6, para. 1

the Sexual Offences (Amendment) Act 1976.⁷⁰³ What was brought under regulation by the 1976 Act was evidence of the sexual history of the complainant with persons other than the defendant. And even in this respect, the recommendations of the Advisory Group were not fully implemented. For example, the condition that the evidence of sexual history of the complainant must relate to an alleged sexual behaviour of the complainant, which is so strikingly similar to her sexual behaviour at the event under inquiry before such evidence may be admitted, was omitted by the Act.

Section 2(2) of the 1976 Act permitted the judge to give leave to adduce evidence of, or to cross-examine on, the complainant's sexual history with third parties "if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked."

Thus, during the operation of the 1976 Act, the common law principles relating to the admission of evidence of the sexual history of a rape complainant with the defendant remained unchanged. Defence lawyers were still free to probe such sexual history for the purpose of attacking the credibility of the complainant. And as regards sexual history with third parties, judges were given a considerably wide discretion to either refuse or accept the admission of such evidence.

⁷⁰³ See section 2(1) of the Act.

This state of affairs was generally criticised as unsatisfactory.⁷⁰⁴ Critics argued that the failure to statutorily regulate the admission of sexual history evidence of the complainant with the defendant (no matter how remote in time and context) continued to create problems of harassment of rape complainants. The prejudicial effect of such evidence could not be ignored.

Further, Temkin had argued that the discretion given to the judges to admit sexual history evidence in respect of third parties was too wide. It enabled the courts to “attribute undue significance to the sexual past of complainants in rape trials.”⁷⁰⁵

Apparently, Section 41 of the Youth Justice and Criminal Evidence Act 1999 set out above was enacted to rectify these observed flaws. According to Mr. Paul Boateng:⁷⁰⁶

“Women – it normally is women although it might be a man – who are considering making an allegation of rape are all too often deterred from so doing, or from going through with the process of prosecution, because they are terrified of having their sexual history trawled through in a gratuitous way

“The intention of the Bill is to keep as much evidence of

⁷⁰⁴ See Temkin, J. (1993). "Sexual History Evidence - the Ravishment of Section Two." Criminal Law Review: 3-20.

, McColgan, A. (1996). "Common Law and the Relevance of Sexual History Evidence." Oxford Journal of Legal Studies 16: 275, and

Birch, D. (2000). "A Better Deal for Vulnerable Witnesses?" Criminal Law Review: 223.

⁷⁰⁵ Temkin, J. (1993). "Sexual History Evidence - the Ravishment of Section Two." Criminal Law Review: 3-20.

⁷⁰⁶ Then Minister of State at the Home Office, speaking in the House of Commons on 24 June 1999. See HC Official Report, Standing Committee E (Human Rights Bill), 24 June 1999, Column 203.

complainant's sexual behaviour out of trials as possible. That is vital if complainants are to pursue their complaints through to trial and not to feel that their privacy is being invaded to discredit and humiliate them. We must ensure that victims have faith in the criminal justice system and believe that their attacker will be on trial, not them and their history. Sexual history should be permitted only in **very limited**⁷⁰⁷ circumstances where it is really relevant to an issue at trial."

Similarly, Lord Williams⁷⁰⁸ expressed the intention of the promoters of the Bill especially as it related to the severe restrictions proposed on evidence of sexual history of the complainant on an issue of consent:

"I have to make it plain that as a matter of government policy we have concluded that evidence of a complainant's past attitude to or experience of sexual relations is not material upon which a jury should reasonably rely to conclude that the complainant might indeed have consented on the occasion that is the subject of the complaint. Consensual sex does not mean consent to sex in general - it does not even mean consent to sex with a particular person - it means consent to sex with a particular individual on a particular occasion

"The fact that a complainant has consented previously does not mean that she will consent again. A woman exercises - and is entitled to exercise - her consent independently on each occasion. The defendant's accumulated knowledge and experience of the complainant may affect his belief in consent at the time of the alleged offence, even though, if he reflects on it later, he may recognise and concede that that belief was mistaken."

By section 41(1) of the 1999 Act above, as a general rule, no evidence is to be adduced about the sexual history of the complainant in a rape case. Further, no question is also to be allowed in cross-examination in respect of such sexual history. This general rule applies equally to a complainant's sexual history with third parties as well as with the

⁷⁰⁷ Bold type supplied for emphasis.

⁷⁰⁸ Of Mostyn, QC, Minister of State at the Home Office, speaking in the House of Lords on 23 March 1999. See Hansard (HL Debates) of 23 March 1999, Columns 1216-1217, 1218.

defendant himself.

Section 41(2) grants power to the court to allow the sexual history evidence of the complainant if, first, section 41(3) or 41(5) applies in the particular case and, secondly, the court determines that excluding the evidence might render the trial unfair.

It is clear that the only difference, which the 1999 Act has brought to the existing law, is the conditions imposed in section 41(3). This is because absents this sub-section, the court is left with the wide discretion which it had under the old dispensation. Under section 2 of the Sexual Offences (Amendment) Act 1976, as under the Youth Justice and Criminal Evidence Act 1999 (absents section 41(3) above-mentioned), the admission of the sexual history evidence of the complainant was subject only to the discretionary power of the court and to nothing else.

However, section 41(3) of the 1999 Act now imposed severe restrictions on the admissibility of the complainant's sexual history that even the court could not waive. Its effect is that once the issue before the court or jury is one of consent, the conditions stipulated in section 41(3)(b)⁷⁰⁹ must be present before the court can even consider exercising its discretion to allow (or disallow) the evidence to be given or the question to be asked in cross-examination.

⁷⁰⁹ Or any one of the alternative conditions stipulated in section 41(3)(a) and (c)

Section 41(3)(b) stipulates that the sexual history evidence sought to be adduced or elicited must relate to an alleged sexual behaviour of the complainant which took place “**at or about the same time**”⁷¹⁰ as the event which is the subject matter of the charge against the accused.”

Unless the specific condition relating to time, as indicated above, is present, or section 41(3)(c) applies in any case, section 41(3)(b) rules out the possibility of admitting evidence with the slightest degree of remoteness. For example, in a case where the issue is one of consent, it would be doubtful if evidence that the complainant had consensual sexual intercourse with the defendant at about 6 O’clock in the morning would be admissible when the allegation was that the rape took place at about 6 O’clock in the evening of the same day.⁷¹¹

However, the important thing about this provision is that once the court determines that the previous sexual behaviour of the complainant sought to be given in evidence did not take place “at or about the same time” as the event in the charge, the court cannot go on to consider its admissibility. This is so even if the context is such that it may well be possible that the evidence strongly supports the defence of consent by the defendant.

⁷¹⁰ Bold type supplied for emphasis.

⁷¹¹ On the other hand, one must not forget that context matters also. For e.g., if the evidence shows that the parties had sex in the morning, and had been enjoying the entire day indoors, each totally naked all the time, it would be unreasonable in those circumstances to exclude the evidence about the morning’s sex session to buttress the claim of the defendant that the sexual intercourse that took place in the evening was consensual. However, the provision appears not to have taken into account the matter of context, although it may well be possible for the court to strain the language a bit to accommodate this kind of scenario.

The second (alternative) condition that must be present before the court can activate its discretionary power to admit sexual history evidence on an issue of consent is contained in section 41(3)(c). This paragraph requires that the previous sexual behaviour of the complainant which is sought to be admitted in evidence must be “so similar” to her behaviour in the instant charge “that the similarity cannot be explained as a coincidence.”

Again, in the absence of such a striking similarity,⁷¹² the court is deprived of the power to even begin to consider exercising its discretionary power to admit (or refuse to admit) the evidence.

As stated above, the main purpose of section 41(3) is to limit as far as possible the circumstances under which the sexual history of the complainant will be relevant to the issue of consent in a rape case, and thus admissible in evidence. The intention is quite clear. It is manifest in the provision. Whether Parliament was right or wrong to go that far in restricting such evidence is another matter. What is important for our present purpose is that the intention of Parliament appears unequivocally clear in section 41(3)(b) and (c). It deliberately imposed those restrictions contained in the relevant paragraphs and did so in such a way that the courts could not waive them.

⁷¹² Or other requirements, as, for example provided in section 41(3)(a) and (b)

APPENDIX 5

PARAGRAPH 2(1) AND (2), SCHEDULE 1 – RENT ACT 1977

2. –

(1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence.

(2) For the purpose of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant.

Legislative History

As originally enacted, paragraph 2(2) protected not the “surviving spouse”, but only the “widow” of the deceased tenant. It meant that only women whose husbands had been deceased could succeed to the statutory tenancy hitherto held by their husbands. This was a reflection of the social conditions of the time. What was common then was that women were viewed, and were in fact usually the dependent half, of the husband-wife relationship. Men were most often the breadwinners and providers of accommodation for the family.

During that dispensation, a widower could not succeed to the statutory tenancy of his deceased wife. With the passage of time, it was felt that this was not good law. There was a need to rectify the situation. Surviving husbands who had been living with their deceased statutory-tenant wives should be able to succeed to the statutory tenancy.

Parliament apparently responded to these concerns. In 1980, it amended paragraph 2(2) by replacing “widow” with “surviving spouse,” thus bringing widowers into the purview of the paragraph.

It is necessary to bear in mind that so far, only legally married couples could qualify as a “surviving spouse” pursuant to paragraph 2(2). To be able to succeed under the paragraph, the survivor had to prove that he or she was legally married to the deceased. Of course, if not

admitted by the opposing party, only the tendering in evidence of the marriage certificate⁷¹³ could prove this.

In 1988, Parliament made two further amendments. First, it decided to phase out statutory tenancies. It did so by providing in paragraph 3 to the Schedule to the 1977 Act that qualifying members of the deceased statutory tenant were to be entitled to an assured tenancy upon the death of the statutory tenant. They were not to continue the statutory tenancy, which was more advantageous.

However, spouses of statutory tenants were not affected by this amendment. Upon the death of their husbands or wives as the case may be, they were to succeed to the statutory tenancy previously held by their spouses. Paragraph 2(1) in its present form reflected Parliament's intention not to alter the rights of surviving spouses of deceased statutory tenants.

The second amendment related to the position of unmarried couples. By 1988, social attitudes had changed so much that it became quite acceptable for a man and a woman to co-habit and live as if they were husband and wife without actually going through the formalities of marriage. It was felt that it was ripe and appropriate to extend the protection offered to married couples under paragraph 2 to unmarried couples as well if they could prove *de facto* marriage. Accordingly, Parliament added sub-paragraph 2(2) and brought unmarried couples under the protection offered by paragraph 2(1).

⁷¹³ Or such other admissible evidence of marriage

The legislative history indicates that entitlement to succeed to a statutory tenancy was given first to a widow, then extended to a widower, and finally to unmarried couples of the opposite sex co-habiting as husband and wife but without being legally married.